Supreme Court, U.S.
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In The
Supreme Court Of The United States

PFIZER, INCORPORATED,

Petitioner,

v.

JAMES D. DOTSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Fourth Circuit create a conflict with nine other circuits by rejecting the distinction between prescriptive and proscriptive rights under the Family and Medical Leave Act, thereby incorrectly transforming a claim of intentional retaliation to one of negligent discharge?

Did the Fourth Circuit create a conflict with this Court and every other circuit where the Fourth Circuit failed to require proof that the decision makers knew of Plaintiff's protected status or activity to support a retaliation claim?

PARTIES TO THE PROCEEDING
(Rule 14(b))

The names of all the parties to this proceeding in the United States Court of Appeals for the Fourth Circuit are listed in the caption.

CORPORATE DISCLOSURE STATEMENT
(Rule 29.6)

PFIZER, INCORPORATED is a publicly held corporation. It has no parent corporation and there is no publicly traded corporation that holds ten percent or more of its stock.

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PFIZER, INCORPORATED ("Pfizer") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit" or "Court of Appeals") in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit is published at 558 F.3d 284, and is reprinted in the Appendix to this Petition at 1a - 36a. ("Pet. App. _____a - ____a"). The Memorandum Opinion of the District Court denying Petitioner's Motion for Judgment as a Matter of Law ("JMOL"), and alternative Motion for a New Trial, is reprinted in the Appendix to this Petition at 37a - 58a. The Memorandum Order of the United States District Court for the Eastern District of North Carolina ("District Court") denying Petitioner's motion for summary judgment is reprinted in the Appendix to this Petition at 59a - 93a.

JURISDICTION

The Fourth Circuit decision and order were entered on March 4, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

The statutes involved in this case are found in the Family and Medical Leave Act. The first two statutes are 29 U.S.C. § 2612(a)(1)(B), and 29 U.S.C. § 2612(b)(1).

Leave Requirement

(a) In general

(1) Entitlement to leave
Subject to Section 2613 of this title, an eligible employee shall be entitled to a total of 12 work-weeks of leave during any 12-month period for one or more of the following:

. . . .

(B) Because of the placement of a son or daughter with the employee for adoption . . .

(b) Leave taken intermittently or on reduced leave schedule

(1) In general
Leave under subparagraph . . . (B) of subsection (a)(1) of this section shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise.

The third principal statute involved in this case is found at under 29 U.S.C. § 2615(a)(1).

> (a) Interference with rights
>
> > (1) Exercise of rights
> > It shall be unlawful for any employer to interfere with, refrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

STATEMENT OF THE CASE

Introduction

Pfizer discharged Respondent Dotson after Dotson took the unprecedented action of transferring Pfizer drugs to an orphanage in Russia at which Dotson was seeking to adopt a child. Dotson's conduct was an improper distribution of the drugs and gave the appearance of Dotson using Pfizer products as a *quid pro quo*. Accordingly, the decision makers in this case believed that this conduct constituted a very serious violation of Pfizer's policies and decided to terminate Dotson's employment.

None of the decision makers believed or had reason to believe that Dotson had exercised leave rights under the Family and Medical Leave Act ("FMLA") or otherwise invoked the FMLA to protect his absences. All that the decision makers in this case knew was that Dotson had used his

purposefully banked vacation days to receive paid time off to take two trips to Russia to complete the adoption. In fact, Dotson had never requested or applied for FMLA leave. Nor did he ever mention the FMLA to the decision makers prior to being discharged. Nonetheless, Dotson brought this action claiming after the fact that his discharge was in retaliation for taking FMLA leave.

Background

Pfizer discovers, manufactures, markets and sells pharmaceuticals throughout the world. As of the date of the trial in this case, it employed over 50,000 people in the United States. J.A. at 1947.[1] Pfizer has many different operating divisions such as research and development, manufacturing, and sales.

As of the date of the trial in this case, between 8,000 and 10,000 employees worked in the Pfizer U.S. Sales organization. J.A. at 1947-48. Most of these employees are dedicated to selling Pfizer's pharmaceutical products to healthcare providers who prescribe medication to their patients. Sales representatives are responsible for, among other things, providing samples of Pfizer products, also known as "starters", to healthcare providers for their patients. J.A. at 1511-12, 1551. The purpose of starters is to allow physicians to start patients on a particular type of product so the physician will then write prescriptions for the product. J.A. at 1222-23, 1545, 1549-50, 1878, 1892, 2920.

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[1] References to ("J.A.") are to the Joint Appendix filed by the parties with the Fourth Circuit on January 14, 2008.

Pfizer's marketing and sale of pharmaceuticals, including the distribution of starters, is heavily regulated by the Food and Drug Administration ("FDA"). J.A. at 2656-57. The handling and distribution of starters by a pharmaceutical company such as Pfizer comes within the purview of the Prescription Drug Marketing Act ("PDMA"), 21 U.S.C. § 353 *et seq.* J.A. at 1838-39, 2656-57, 2924-26. Under the PDMA, Pfizer must track and account for all starters transferred to physicians. J.A. at 1244, 1850-51, 1979, 2656-57.

Pfizer's written policies published to all sales employees prohibit any inappropriate distribution of starters by a Pfizer employee, including any action that has the appearance of a *quid pro quo*. J.A. at 1227, 1235-36, 1239, 2699. Employees who violate these policies are subject to serious discipline, including discharge. J.A. at 1227, 1235-36, 1239, 2699.

The respondent in this case, James Dotson, commenced employment with Pfizer in November 1988 as an entry-level sales representative. J.A. at 910. As a sales representative, Dotson was trained in appropriate starter-handling policies and procedures and distributed starters to physicians and healthcare providers. J.A. at 1242-43, 1247. In 1991, Dotson was promoted to District Manager in Pfizer's Roerig Sales Division. J.A. at 914, 917. In the fall of 1998, Dotson was promoted to Regional Manager for the Steere Sales Division. J.A. at 919-20.

In February 2002, Dotson was removed from his Regional Manager position and moved into a position called an Institutional Healthcare Account Manager ("IHAM"). This position was in a different branch of the Pfizer sales organization called National Healthcare Organization ("NHO"). J.A. at 921, 925-27, 940-41, 944. Members of NHO were responsible for calling upon managed health care organizations, large employers, and insurance companies to convince them to include Pfizer products in health coverage plans. J.A. at 946, 1242-43, 2351-52. However, NHO employees were **not** responsible for handling starters because they did not typically call upon individual health care providers who dispensed medication to patients. J.A. at 1117, 1246, 1250-51, 2351-52, 2356-57.

In late 2002 Dotson was transferred to a different job in NHO called a Regional Account Manager ("RAM"). J.A. at 965-66. Dotson's position was realigned from the Mid-Atlantic Region to the Southeast Region.

In late 2002 or early 2003, Dotson advised Pfizer that he planned to adopt a child. J.A. at 995-96, 1008-09, 1022-23. Dotson also advised Pfizer that he would need to travel overseas and that he had saved thirty to forty days of accrued paid vacation time that he intended to use intermittently to complete the adoption. J.A. at 1049-50, 1210-11. At trial, Dotson admitted that he never intended to use FMLA leave because FMLA was unpaid leave and he wanted his absences to be paid. J.A. at 1211.

On or about August 27, 2003, Dotson was notified that the adoption agency had identified a child for adoption living in an orphanage in Russia. J.A. at 1004-05, 1008. Dotson advised Pfizer he would need to make two different trips to Russia and would take his **paid leave** intermittently. J.A. at 1006-08.

After learning of the opportunity to adopt, Dotson decided that he would obtain a case of a Pfizer antibiotic product called Zithromax and take the product to the orphanage as a gift. J.A. at 1238-40. Because Dotson was an employee of NHO and did not have Zithromax in his possession, he obtained Zithromax starters from a sales representative who regularly received and transferred Zithromax starters to physicians. J.A. at 1302-05.

Until two days before his first trip to Russia, Dotson never discussed with anyone at Pfizer the FMLA or the possibility of requesting or using FMLA leave to complete the adoption. J.A. at 1092. On or about Friday, September 19, 2003—two days before leaving for Russia—Dotson called a Human Resources representative in Pfizer's Mid-Atlantic Region, Amy Burnell, to discuss his leave options. J.A. at 1049. Dotson had worked with Burnell when he was a Regional Manager, but at the time of his call, he reported to a different Human Resources team. J.A. at 1049, 2235-36. Burnell testified that she told Dotson that she could not help him because Dotson no longer worked in her region, and that Dotson needed to call her counterpart in the Southeast Region. Dotson declined to call his

Southeast Region Human Resources representative and never requested or applied for FMLA leave. J.A. at 1050-51, 1210-11.[2]

Two days after he spoke to Burnell, on September 21, 2003, Dotson left on his first trip to Russia and used his banked **paid vacation** days so that the absences would be paid. During this first trip, Dotson gave the case of Zithromax to a person who identified himself as a doctor at the orphanage. J.A. at 1039. Dotson returned to the United States and his job at Pfizer on September 26, 2003. J.A. at 1036.

Dotson's annual business review was held on October 11, 2003. During this meeting, Dotson was advised by his direct supervisor that his handling of starters and his transfer of starters to a Russian orphanage had not been proper.[3]

On October 13, 2003, Dotson left for his second trip to Russia. During this second trip, he was awarded custody and granted an adoption.

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[2] Burnell also told Dotson that he was eligible for FMLA and that if Dotson requested FMLA leave, his paid vacation days would be counted against his FMLA complement. J.A. at 2235-36. Dotson contends that Burnell told him that he would have to "burn up" his vacation time before he would "benefit from" the FMLA. J.A. at 1049-50.

[3] Dotson acknowledged that his transfer of starters to a Russian orphanage was a serious issue and threatened his job. J.A. at 1058.

On October 25, 2003, Dotson returned from his second trip to Russia with his new daughter and again returned to his NHO position. J.A. at 1087-88.

While Dotson was in Russia during his second trip, Pfizer followed its normal routine for evaluating violations of Pfizer policies. Under Pfizer's routine investigative procedures, an employee's direct supervisor is excluded from discussions that might lead to serious discipline. J.A. at 1709, 2160, 2275. Pfizer had adopted this rule to ensure the integrity and objectivity of the process. J.A. at 2160, 2275. Consistent with this rule, **Dotson's direct supervisor did not participate in the discussions that led to Pfizer's ultimate decision to terminate Dotson**. J.A. at 1709, 2160, 2205, 2275, 2352.

Dotson's second-level supervisor, Area Manager Patrick McElerney, prepared a summary of his understanding of Dotson's performance and Dotson's handling of starters and forwarded this summary to his own supervisor, NHO Vice President Steve Harper. J.A. at 2226-27, 2628-29. The critical facts, as they relate to this Petition, are undisputed. Dotson obtained starters and gave them to an orphanage at which he was seeking an adoption. Harper believed that Dotson's decision to take starters overseas to an orphanage at which he was seeking an adoption was an improper distribution of the starters and gave the appearance of Dotson using Pfizer products as a *quid pro quo*. Harper believed that this constituted a very serious violation of Pfizer's policies. J.A. at 2352-54.

No Pfizer employee had ever taken Pfizer drugs and distributed them to an orphanage at which they were seeking an adoption, making Dotson's action unprecedented. J.A. at 1218-21, 2206, 2278, 2361. Harper concluded it was important to discourage future conduct of this nature. J.A. at 2358. Thus, Harper determined that Dotson's violation was egregious enough to warrant discharge. J.A. at 2205-07. **Harper had no knowledge of whether Dotson had used or requested FMLA leave for his adoption related absences.** J.A. at 1048, 1092, 1620, 1722, 1724, 2190, 2205.

The decision regarding Dotson's employment did not end with Harper. The discharge decision was reviewed with other senior sales leaders to make sure there was consensus on the decision, including Harper's supervisor, an Executive Vice President, and a corporate-level Human Resources Vice President. J.A. at 2085, 2086-87, 2266. All of these individuals reviewed and discussed Dotson's case and agreed with Harper's recommendation. J.A. at 2160-61, 2205, 2279, 2361.

All that the decision makers knew was that Dotson had used his banked paid vacation days for adoption trips. None of them—including McElerney—believed or had reason to believe that Dotson had exercised leave rights under the FMLA or otherwise invoked the FMLA to protect his absences. J.A. at 1048, 1092, 1620, 1722, 1724, 2190, 2205. In fact, Dotson had never requested or applied for FMLA leave. J.A. at 1050-51, 1210-11.

Dotson was advised of Pfizer's decision to terminate his employment on November 11, 2003. J.A. at 1713, 2132. Dotson was told that his mishandling of starters violated Pfizer's long-standing policy prohibiting conduct that might give the appearance of a *quid pro quo*. J.A. at 2132.[4]

Dotson filed this action in September 2004. On March 10, 2006, the District Court denied Pfizer's motion for summary judgment. Pet. App. 93a. A jury trial began in May 2006 and lasted eight days. The jury awarded $331,429.25 on Dotson's retaliation claim. Pfizer filed a motion for Judgment as a Matter of Law ("JMOL") and an alternative Motion for a New Trial in June 2006. After trial, Dotson filed Proposed Findings of Fact and Conclusions of Law Regarding Front Pay and a Motion for Liquidated Damages, Attorney's Fees, and Costs. The District Court denied Pfizer's JMOL Motion and awarded Dotson liquidated damages as well as attorney's fees and costs. It denied Dotson's motion for front pay and prejudgment interest. Pet. App. 56a - 57a.

On appeal to the Fourth Circuit, Pfizer challenged the District Court's denial of its JMOL motion, and the award of liquidated damages and attorney's fees. Dotson appealed the District Court's denial of prejudgment interest and front pay, and argued that the award of attorney's fees was inadequate. Pet. App. 24a.

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[4] Notably, Dotson admitted that he "should have exercised more caution in providing these samples to the orphanage." J.A. at 2828.

The Fourth Circuit affirmed the rulings of the District Court on all matters except to the extent the Court of Appeals ruled that Dotson was entitled to prejudgment interest and attorney's fees related to obtaining prejudgment interest. Pet. App. 34a.

Pfizer's petition for certiorari only seeks review of the decision by the Fourth Circuit to the extent it did not grant Pfizer's Motion for JMOL on Dotson's claim of retaliation.

ARGUMENT

I. The Fourth Circuit's Decision Directly Conflicts with Settled Precedent In Nine Other Circuits Applying Different Proof Standards for FMLA Retaliation Claims.

The Fourth Circuit in *Dotson* erroneously applied a standard for FMLA *prescriptive* claims to a *proscriptive* FMLA protection and by doing so effectively eliminated the difference between the two claims and created a conflict with nine other circuit courts.

A. Nine Other Circuit Courts Recognize and Apply the Distinction Between Prescriptive and Proscriptive Rights Under the FMLA.

Nine other circuit courts conflict with the decision of the Fourth Circuit in this case. These other circuit courts have recognized or applied the distinction between prescriptive and proscriptive

rights under the FMLA or otherwise recognize the difference between proof requirements for interference claims (prescriptive rights) and retaliation claims (proscriptive protections) under the FMLA. *See, e.g., Mellen v. Trs. Of Boston Univ.*, 504 F.3d 21, 26 (1st Cir. 2007); *Potenza v. City of New York*, 365 F.3d 165, 168 (2d Cir. 2004); *Callison v. City of Philadelphia*, 430 F.3d 117, 119 (3d Cir. 2005); *Haley v. Alliance Compressor LLC*, 391 F.3d 644, 649 (5th Cir. 2004); *Taylor v. Union Inst.*, 30 Fed. App'x 443, 452 (6th Cir. 2002); *King v. Preferred Technical Group*, 166 F.3d 887, 891 (7th Cir. 1999); *Phillips v. Matthews*, 547 F.3d 905, 911 (8th Cir. 2008); *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1180 (10th Cir. 2006); *Strickland v. Water Works & Sewer Bd.*, 239 F.3d 1199, 1207-08 (11th Cir. 2001). The decision in *Dotson* eviscerates this distinction and puts the Fourth Circuit in conflict with these nine other circuits.

Prescriptive rights are mandated benefits under the FMLA. These include the availability of twelve work weeks of leave and the right to be restored to the same or similar position after a return from FMLA leave. *Peters v. Community Action Comm., Inc.*, 977 F. Supp. 1428, 1432 (M.D. Ala. 1997) (describing as prescriptive in nature rights established by 29 U.S.C. §§ 2612 and 2614). The failure of the employer to provide these prescriptive rights violates the FMLA regardless of the employer's intent. *E.g., Phillips*, 547 F.3d at 911; *Metzler*, 464 F.3d at 1180; *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1353-54 (11th Cir. 2000). In regards to *prescriptive* rights, the Fourth Circuit opinion below was correct that

"[c]ase law and federal regulations make it clear, however, that employees do not need to invoke the FMLA to benefit from its protections." Pet. App. 13a - 14a. **However, no claim involved in this Petition involves prescriptive rights.**

To the contrary, Dotson's retaliation claim invokes a "proscriptive" FMLA right. To establish a violation of one of the proscriptive provisions of the FMLA, an employee must demonstrate that the employer had actual notice that the employee was exercising his right to use FMLA leave to cover his absences—it is not enough to show that the employer had notice of the employee's need for leave for a reason that might be covered by the FMLA. *Strickland*, 239 F.3d at 1207-08.

B. The Fourth Circuit in *Dotson* Rejected the Retaliation Standard From Other Circuits, Including the Directly Contrary Standard From the Eleventh Circuit.

In *Dotson*, the Fourth Circuit erroneously equated knowledge of Dotson's adoption-related trips with knowledge that Dotson had invoked the protection of the FMLA for his adoption-related absences. In so doing, the Fourth Circuit incorrectly conflated the standard for prescriptive and proscriptive claims putting itself in conflict with nine other circuits, including the directly contrary standard from the Eleventh Circuit in *Strickland*, 239 F.3d at 1207-08.

In *Strickland*, the plaintiff left work claiming that he needed the rest of the day off because he was having a diabetic attack. *Id.* at 1202. Before he could return to work, his employer discharged Strickland for walking off the job. *Id.* at 1203. Strickland asserted two claims: (1) a *prescriptive* claim alleging that the company denied him a substantive benefit under the FMLA (i.e., reinstatement); and (2) a *proscriptive* claim alleging that his employer retaliated against him for exercising rights under the FMLA. *Id.* at 1207-08.

The Court rejected Strickland's retaliation claim and allowed the prescriptive claim to go forward. *Id.* at 1208. The information provided by Strickland to his employer about the reason for his need for leave (that he was having a diabetic attack) was enough notice for purposes of his *prescriptive* right claim. *Id.* at 1208-09. However, on the retaliation claim, which implicated the *proscriptive* rights of the statute, the Court found that there was no evidence that the employer "had notice that Strickland was *invoking the protection of the FMLA* when he left work that day. *Nor did Strickland refer to the FMLA at any time* prior to the [employer's] decision to discharge him." *Id.* at 1207 (emphasis added).

Because Strickland failed to mention the FMLA or otherwise request leave under the FMLA, "the decision maker did not have knowledge that [Strickland] had engaged, or was attempting to engage, in protected conduct." *Id.* at 1207 (citations omitted). The proscriptive claim therefore failed because a "decision maker cannot have been

motivated to retaliate by something unknown to him." *Id.* at 1208 (internal quotations and citations omitted); *see also Wright v. Owen-Illinois, Inc.*, No. 2:02-CV-223, 2004 U.S. Dist. LEXIS 8535, at *22 (S.D. Ind. May 14, 2004) (stating that where plaintiff did not request FMLA leave, "it is difficult for [plaintiff] to argue that he was retaliated against for exercising his FMLA rights"); *Walthall v. Fulton County Sch. Dist.*, 18 F. Supp. 2d 1378, 1383 (N.D. Ga. 1998) ("[T]here is some threshold notice that must be given to the employer before a claim can be made for a violation of the FMLA."); *cf. Thornton v. BASF*, No. 99-2243, 2000 U.S. App. LEXIS 15909, at *4-6 (4th Cir. July 11, 2000) (employee leave not necessarily a FMLA-protected leave where employee did not request FMLA leave but instead requested and received short-term disability benefits).[5]

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[5] The *Strickland* plaintiff's evidence of alleged retaliation was far stronger than the evidence presented by Dotson. The company in *Strickland* admitted that it discharged the plaintiff because he left work. Here, there is no evidence that any of the decision makers agreed to Dotson's discharge because he was away from work. In fact, Dotson's absences were excused because he chose a **paid vacation**, and he was allowed to return to work following both of his trips to Russia. Because he was "reinstated" following both trips, Dotson's prescriptive right to reinstatement was fully honored.

Dotson intentionally saved company-paid vacation for the purpose of his adoption absences and requested use of that company-paid benefit to cover his adoption-related absences. J.A. at 1049. Neither Dotson nor any of his supervisors believed that he was taking FMLA leave by traveling to Russia on two different occasions to adopt his child. *See De Hoyos v. Bristol Labs. Corp.*, 218 F. Supp. 2d 222, 226-27 (D.P.R. 2002) (finding no unlawful retaliation under the FMLA where plaintiff used accrued vacation to care for his mother absent evidence employer thought plaintiff was exercising FMLA rights when leave was taken). Dotson admitted that he would not have taken unpaid FMLA leave for his adoption-related absences rather than paid vacation time. J.A. at 1211. Dotson also testified that he never discussed the FMLA with his supervisors. J.A. at 1092. **It is also undisputed that the decision makers involved in Dotson's termination did not know whether Dotson had or had not invoked the FMLA to cover his adoption-related absences.** J.A. at 1048, 1092, 1620, 1722, 1724.

In cases involving an alleged violation of a *proscriptive* entitlement, the motivation of the employer is the central, crucial issue in the case. *Strickland*, 239 F.3d at 1207-08. Notice to Pfizer that Dotson was taking a trip that *might* be covered by the FMLA is of no legal consequence and is distinctly different from notice that he intended to exercise his right to use FMLA leave to cover that absence. *Strickland*, 239 F.3d at 1207-08; *see also Walthall*, 18 F. Supp. 2d at 1383-84.

The Fourth Circuit admitted that the *Strickland* Court "appeared" to embrace a higher standard for retaliation claims as opposed to claims based upon prescriptive rights. However, the Fourth Circuit expressly declined to adopt this standard. Pet. App. 14a – 15a.

C. The Fourth Circuit's Decision to Reject *Strickland* Eliminates the Intent Element of the Proscriptive Retaliation Claim and Erroneously Transforms a Claim of Intentional Retaliation to One of Negligent Discharge.

Allowing Dotson's claim to survive under the undisputed facts of this case eliminates the requirement of intent from an FMLA retaliation claim as recognized by *Strickland*.

The Fourth Circuit attempted to distinguish *Strickland* by holding that "in contrast to the last-second, confusing statements made by the employee in *Strickland*, Dotson gave clear and advance notice that he was pursuing an adoption, an FMLA-qualifying event." This is wrong in several aspects. First, as explained in more detail below, intermittent absences for an adoption are not automatically an "FMLA qualifying event".[6] In addition, the Fourth Circuit effectively held Pfizer decision makers liable

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[6] Certainly, Strickland's notice that he was leaving work because of a "diabetic attack" was more "clear and advance" notice of an FMLA-qualifying event than Dotson's notice that he would be using paid vacation to take intermittent trips to adopt a child.

for the purported negligence of a lower-level human resources representative who allegedly misguided Dotson on his FMLA rights. The Fourth Circuit ignored the fact that Dotson's conversation with Amy Burnell was just as "last second" as the events in *Strickland*. Dotson called Burnell for advice two days before his trip to Russia. **No one other than Burnell and Dotson knew of this conversation until after this suit was filed.** Dotson was advised to contact his designated human resources representative if he wished to pursue FMLA leave and Dotson declined to do so.

The effect of the Fourth Circuit decision, then, is to replace the intent element (as found by *Strickland* and other circuits to be required to prove FMLA retaliation) with a negligence standard of liability. There was no evidence that any of the decision makers knew of Dotson's conversation with Burnell, much less what was said. Further, there is no cognizable violation of the FMLA if an employer fails to notify an employee of his FMLA rights absent proof of damage. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002). Dotson took his paid vacation and returned to work both times. Thus, the failure to send Dotson written notice of his FMLA rights did not infringe on Dotson's prescriptive rights. *See id.*

The Fourth Circuit' decision holds the decision makers liable for Burnell's alleged negligence even though none of the decision makers had knowledge of the Dotson-Burnell conversation. There is no precedent for allowing proof of negligence by a lower-level *non*-decision maker as a substitute for proof of

actual intent to retaliate by the *actual* decision makers.

Furthermore, there is no basis in either the statute or regulations for the notion that an employee may sue for retaliation even when he had not taken FMLA leave. Section 2615 of the FMLA makes it "unlawful for the employer to interfere with, restrain or deny the exercise of or attempt to exercise, any right provided under this subchapter." 29 U.S.C. § 2615(a)(1). As the Fourth Circuit decision notes, while the FMLA does not specifically forbid discharging an employee "in retaliation for his **use of FMLA leave** . . . [c]ourts have recognized that the FMLA provides a cause of action for retaliation." Pet. App. 13a (emphasis added). There is no statutory or regulatory provision that allows a retaliation claim by an employee who had not in fact used or taken FMLA leave. The Fourth Circuit's decision to allow an employee who has not used FMLA leave to file a claim for retaliation simply because he took a paid vacation for something that **might** have qualified for FMLA if requested creates a new cause of action for negligent discharge not found in the statute or any of the interpretive regulations.

D. The Intermittent Nature of Dotson's Absences Makes the Fourth Circuit's Failure to Focus on Intent Even More Significantly Erroneous.

Dotson did not request or take one block of consecutive leave for the adoption—he took his leave intermittently. However, under the FMLA, intermittent leave for an adoption is not automatic and may occur only when *both* the employer and employee agree. 29 U.S.C. § 2612(b)(1). Dotson had the right to turn down intermittent FMLA leave, even if Pfizer had wanted to designate his absences as FMLA leave. Thus, even if all the decision makers were experts on the FMLA—which they were not—they could not have assumed that Dotson intended to exercise FMLA rights because such a result could not be forced upon Dotson if he did not agree with such a designation. In fact, it was much more reasonable for the decision makers to assume—even if they were all FMLA experts—that Dotson had not exercised FMLA rights. After all, the decision makers could not just assume that Dotson would request such a designation since it would effectively reduce his FMLA complement, especially where, as here, he had plenty of paid vacation leave.

Because the decision makers who agreed to discharge Dotson did not have notice that Dotson was exercising his right to use FMLA leave to cover his absences, they could not have formed an intent to retaliate against him for exercising such a right. *Lackey v. Jackson County*, 104 Fed. App'x 483, 490 (6th Cir. 2004) (stating that plaintiff's discharge

"could not have been a retaliation for asserting his FMLA rights because Defendant did not know that Plaintiff was asserting his FMLA rights").

Under the Fourth Circuit's decision, however, the fact that Dotson's intermittent absences were not, by definition, FMLA leave does not matter. The only thing that matters in the Fourth Circuit's view is that the absences could have been protected under the FMLA if both Dotson and Pfizer had agreed to designate them as such. In so holding, the Fourth Circuit has removed the proscriptive retaliation claim from its fundamental mooring – knowledge by Pfizer that the activity engaged in by Dotson was protected. Absent knowledge by Pfizer that Dotson had in fact engaged in protected activity, no rational jury could infer or deduce an intent to retaliate. No such knowledge or intent was present here, and the intermittent nature of the alleged protected absences highlights that fact.

II. The Fourth Circuit Decision Conflicts With This Court and Every Other Circuit Because the Fourth Circuit Did Not Require Proof That The Decision Makers Knew of Plaintiff's Protected Status or Activity To Support a Retaliation Claim.

The Fourth Circuit decision in *Dotson* contravenes a bedrock principle of employment law: that an employer cannot be liable for retaliation unless the plaintiff demonstrates that the decision maker knew of the plaintiff's protected activity. Every single circuit has recognized this fundamental principle. *E.g., Stinson v. SimplexGrinnel LP*, 152

Fed. App'x 8, 11 (1st Cir. 2005); *Paulino v. The New York Printing Pressman's Union, Local Two*, 301 Fed. App'x 34, 38 (2d Cir. 2008); *Walsh v. Wal-Mart Stores, Inc.*, 200 Fed. App'x 134, 137 (3d Cir. 2006); *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998); *Amie v. El Paso Independent Sch. Dist.*, 253 Fed. App'x 447, 455 (5th Cir. 2007); *Prechtel v. Kellogg's*, 270 Fed. App'x 379, 381 (6th Cir. 2008); *Nagle v. Vill. of Calumet Park*, 554 F.3d 1106, 1122 (7th Cir. 2009); *Jackson v. United Parcel Service, Inc.*, 548 F.3d 1137, 1143 (8th Cir. 2008); *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 797 (9th Cir. 1982); *Williams v. Rice*, 983 F.2d 177, 181 (10th Cir. 1993); *Raney v. Vinson Guard Serv., Inc.*, 120 F.3d 1192, 1197 (11th Cir. 1997); *Mitchell v. Baldridge*, 759 F.2d 80, 86 (D.C. Cir. 1985).

Further, the Fifth Circuit has stated that in a retaliation case the "evidence must be sufficient to permit a reasonable fact finder to conclude that the decision maker had actual knowledge of the protected activity." *Amie*, 253 Fed. App'x at 455. The Ninth Circuit has vacated a District Court's finding of retaliation where there was no evidence that the decision maker knew of plaintiff's alleged protected activity. *Cohen*, 686 F.2d at 797-98. The Eleventh Circuit stated that because "corporate defendants act only through authorized agents, in a case involving a corporate defendant the plaintiff must show that the corporate agent who took the adverse action was aware of the plaintiff's protected expression". *Raney*, 120 F.3d at 1197. That Circuit has also held that "[d]iscrimination is about actual knowledge, and real intent, not constructive knowledge and assumed intent. When evaluating a

charge of employment discrimination, then, we must focus on the actual knowledge and actions of the decision maker." *Walker v. Prudential Prop. & Cas.*, 286 F.3d 1270, 1274 (11th Cir. 2002) (internal citation omitted).

Similarly, this Court and at least six Circuit Courts of Appeal have recognized that an employer may not be liable for discrimination/retaliation where the decision maker has no knowledge of the claimant's purported protected status. *See, e.g., Raytheon Co. v. Hernandez*, 540 U.S. 44, 54 n.7 (2003); *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 82 (2d Cir. 2005); *Geraci v. Moddy-Tottrup, Int'l, Inc.*, 82 F.3d 578, 581 (3d Cir. 1996); *Landefeld v. Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1181-82 (6th Cir. 1993); *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 932-33 (7th Cir. 1995); *DeHorney v. Bank of America Nat'l Trust and Savings Ass'n*, 879 F.2d 459, 468 (9th Cir. 1989); *Lubetsky v. Applied Card Sys., Inc.*, 296 F.3d 1301, 1306 (11th Cir. 2002).

In *Raytheon Co.*, this Court noted the logical impossibility of an employment decision being based, even in part, on a protected class where the decision maker was "truly unaware" of the existence of the protected class. *Raytheon Co.*, 540 U.S. at 54 n.7. The Second Circuit has "conclud[ed] that a defendant's discriminatory intent cannot be inferred, even at the prima facie stage, from circumstances unknown to the defendant." *Woodman*, 411 F.3d at 82.

The Fourth Circuit's decision in *Dotson* conflicts with these cases by allowing Pfizer to be liable for intentional retaliation even where it was undisputed that the decision makers had no knowledge whether Dotson had invoked the FMLA to protect his adoption-related absences. Indeed, it is undisputed that the decision makers were not even aware that Dotson had called Burnell to inquire about FMLA leave.

Allowing such a decision to stand will, in the words of the Seventh Circuit, create "an enormous sphere of potential liability" in this area. *Hedberg*, 47 F.3d at 934. The decision makers in Dotson's termination had no knowledge of his alleged and disputed conversation about the FMLA with Burnell. Allowing Pfizer to be held liable based on this alleged conversation amounts to finding discrimination or retaliation without proving that the decision makers had knowledge of a protected activity or class. It holds an employer liable based on a single inquiry about the FMLA, unknown to the decision makers, which did not even result in a request for FMLA leave, and where the plaintiff employee conceded that he did not intend to use unpaid FMLA leave.

Moreover, the Fourth Circuit's decision holds Pfizer liable for absences by Dotson that Pfizer's decision makers could not have known were or were not FMLA leave. Dotson's multiple trips to Russia to adopt a child were not, in and of themselves, "FMLA leave". As noted above, for the intermittent absences to pursue an adoption to constitute "FMLA leave", both Dotson and Pfizer would have to agree to

designate the absences as FMLA leave. It was undisputed that no such designation occurred. Why the designation did not occur is irrelevant because it is undisputed that the decision makers had no knowledge of any such designation or why no such designation was made. To hold Pfizer liable where the decision makers indisputably lacked knowledge of whether these trips had been, in fact, designated by both Dotson and the company as FMLA leave is tantamount to holding Pfizer liable for retaliation or discrimination in the absence of knowledge of a protected activity or class.

CONCLUSION

For the foregoing reasons, Pfizer respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAMES D. DOTSON,

Plaintiff-Appellee,

v. No. 07-1920

PFIZER, INCORPORATED,

Defendant-Appellant.

JAMES D. DOTSON,

Plaintiff-Appellant,

v. No. 07-1979

PFIZER, INCORPORATED,

Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of North Carolina, at
Raleigh.
W. Earl Britt, Senior District Judge.
(5:04-cv-00722-BR)

Argued: September 23, 2008

Decided: March 4, 2009

Before MOTZ and AGEE, Circuit Judges, and James C. CACHERIS, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part, reversed in part, vacated in part, and remanded by published opinion. Senior Judge Cacheris wrote the opinion, in which Judge Motz and Judge Agee joined.

COUNSEL

ARGUED: Thomas A. Farr, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., Raleigh, North Carolina, for Appellant/Cross-Appellee. William Parker Barrett, WILLIAMS MULLEN, Raleigh, North Carolina, for Appellee/Cross-Appellant. **ON BRIEF:** James H. Stewart, III, Phillip J. Strach, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., Raleigh, North Carolina, for Appellant/Cross-Appellee. Joshua M. Krasner, Jonathan R. Bumgarner, Brian C. Vick, WILLIAMS MULLEN, Raleigh, North Carolina, for Appellee/Cross-Appellant.

OPINION

CACHERIS, Senior District Judge:

This case reaches the Court after a full trial on the merits in the Eastern District of North Carolina. James Dotson ("Dotson") brought suit against his employer, Pfizer, Inc. ("Pfizer"), for violations of the Family and Medical Leave Act of

1993, 29 U.S.C. § 2601, et seq. (the "FMLA"). The jury awarded Dotson $1,876.00 on his FMLA interference claim and $331,429.25 on his retaliation claim. The district court awarded Dotson $333,305.25 in statutory liquidated damages, $375,000.00 in attorneys' fees, and $14,264.88 in costs. Each party appealed different rulings of the district court. Finding error with the district court's decision to deny pre-judgment interest, we affirm in part, reverse in part, vacate in part, and remand.

I.

Pfizer terminated Dotson shortly after he and his wife returned from Russia with their newly-adopted child. Prior to his termination, Dotson had worked at Pfizer for approximately fifteen years. He began his career there in 1988 at an entry-level sales position. In 1991 he was promoted to District Manager; seven years later he became a Regional Manager responsible for more than 100 sales representatives.

In 2002, Dotson took on a new position as an Institutional Healthcare Account Manager in Pfizer's National Healthcare Organizations ("NHO") division. There, he dealt with managed care organizations, insurance companies, and large employers rather than healthcare providers. The parties dispute the facts related to Dotson's 2002 reassignment. Pfizer characterizes the new job as a demotion for unsatisfactory performance. Dotson notes that he did not take a pay cut and that he received no information indicating performance deficiencies. Approximately one year later, Dotson

was reassigned again, this time as a Regional Account Manager in the same institutional healthcare division. In his new position, Dotson's immediate supervisor was Chris Kennedy ("Kennedy"), who reported to Regional Manager Patrick McElerney ("McElerney").

As part of his training as a sales representative, Dotson was instructed in the proper handling of sample packs of Pfizer products, called "starters." Sales representatives provide starters to doctors, who give them to their patients in order to get a patient "started" on a drug for which the doctor will then write prescriptions. The Food and Drug Administration regulates the use of starters. The Prescription Drug Marketing Act, 21 U.S.C. § 353 et seq. (the "PDMA"), covers their distribution. The PDMA requires Pfizer to track and account for any starters given to physicians. Pfizer uses electronic tracking and "starter activity forms" to fulfill its responsibilities under the statute.

The PDMA also requires pharmaceutical companies to report any improper diversions of starters or intentional falsifications of starter forms. Violations can result in sanctions ranging from fines and the loss of drug distribution rights to imprisonment for some criminal violations of the statute. Under its starter policies, Pfizer can discharge employees for violations; however, at the time Dotson was fired, the company did not provide specific details of its standards for discharge. The NHO division was not responsible for handling starters and did not receive starter activity forms or shipments of starters.

In early 2003, Dotson and his family began working with an adoption agency to adopt a child from Russia. Dotson called a Pfizer third-party benefits contractor to inquire about adoption benefits provided by the company. Later that year, Dotson and his wife learned that they could adopt a baby girl but would have to make at least two trips to Russia to complete the adoption. Dotson spoke with a Pfizer human resources ("HR") representative about taking leave during the adoption process. Testimony differed as to what the HR representative, Amy Burnell ("Burnell"), told Dotson about his intention to use accrued vacation time and the applicability of FMLA benefits. Burnell referred Dotson to another HR officer whom Dotson never contacted. He used accrued vacation time to take his first trip to Russia. Both parties agree that, around this time, Dotson's relationship with his immediate supervisor, Kennedy, was deteriorating.

Around August 2003, Dotson obtained starters from a Pfizer sales representative that he intended to give to the Director of Medicine for the North Carolina Highway Patrol. Pfizer alleges that Dotson's request for and subsequent handling of the starter violated company protocol. Later, after finding out that he was eligible to adopt and learning from the agency that it was customary to bring gifts for the orphanage, Dotson decided to obtain a case of starters of the antibiotic Zithromax to take to the orphanage in Russia. In connection with this decision, the parties dispute Dotson's intent, his familiarity with starter protocol, and whether he knew that such an endeavor violated

company policy. Dotson delivered the Zithromax to the orphanage on his first trip to Russia.

During a performance review shortly after that first trip, Dotson's two immediate supervisors informed him that they were unhappy with his job performance and expressed concern about his use of the Zithromax. Dotson later contacted his regional HR director, Ann Hodges ("Hodges"), to discuss the negative performance review. Hodges also said she was concerned about Dotson's handling of starters. After speaking with Hodges, Dotson left with his wife for a second trip to Russia. Pfizer then began an evaluation of Dotson's actions. As part of that evaluation, McElerney related a summary of Dotson's actions to Steve Harper, a Pfizer Vice President, who believed that the use of the Zithromax could be viewed as a prohibited *quid pro quo* with the Russian orphanage. Harper determined that Dotson's conduct warranted discharge, and an executive group within Pfizer management concurred. Pfizer terminated Dotson on November 11, 2003 — less than three weeks after Dotson and his wife returned from Russia with their adopted child. Dotson claims that the starter issue was used as a pretext to fire him and that the "policy" against his use of the starters was unknown to anyone outside the group that made the decision to terminate him. Pfizer did not report Dotson's alleged PDMA violation until 2005.

Dotson filed suit in September 2004. In October 2005, Pfizer amended its Answer to assert an after-acquired evidence defense against Dotson. The new defense related to Dotson's delivery of

starters to the North Carolina Highway Patrol and to his purported misleading of a Pfizer starter control official, which Pfizer claims led to its late reporting of the PDMA violation. A jury trial began in May 2006 and lasted eight days. The jury found that Pfizer interfered with Dotson's rights to FMLA leave and that it discharged Dotson in retaliation for his exercise of those rights. It awarded him $1,876 on his claim of interference and $331,429.25 on his retaliation claim. Pfizer filed a Motion for Judgment as a Matter of Law ("JMOL") and an alternative Motion for a New Trial in June 2006. After the trial, Dotson filed a Proposed Findings of Fact and Conclusions of Law Regarding Front Pay and a Motion for Liquidated Damages, Attorneys' Fees, and Costs. The Court denied Pfizer's JMOL motion and awarded Dotson $375,000 in liquidated damages, as well as attorneys' fees and costs. It denied Dotson's motion for front pay and prejudgment interest. On appeal, Pfizer challenges the court's denial of its JMOL motion, the award of liquidated damages, and the amount of attorneys' fees awarded. Dotson appeals the court's denial of pre-judgment interest and front pay, and contends that the award of attorneys' fees was inadequate.

II.

Pfizer argues that the district court erred by denying its post-trial motion for judgment as a matter of law. We review the denial of a motion for judgment as a matter of law *de novo*, viewing the evidence in the light most favorable to the prevailing party. *Rodriguez v. Smithfield Packing Co.*, 338 F.3d 348, 354 (4th Cir. 2003) (citing *Austin v. Paramount*

Parks, Inc., 193 F.3d 715, 727 (4th Cir. 1999)). A trial court may grant judgment as a matter of law when it "finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for" the non-moving party. Fed. R. Civ. P. 50(a)(1); *see Brown v. CSX Transp., Inc.*, 18 F.3d 245, 248 (4th Cir. 1994). A court, however, may not disturb the verdict where there was sufficient evidence for a reasonable jury to find in the non-movant's favor. *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 259 (4th Cir. 2001). "A trial court may not appropriately enter [JMOL] unless it concludes, after consideration of the record as a whole in the light most favorable to the non-movant, that the evidence presented supports only one reasonable verdict, in favor of the moving party." *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 458 (4th Cir. 1989) (citation omitted).

A.

Pfizer raises three grounds on which it contends the district court should have granted its motion for judgment as a matter of law on Dotson's FMLA retaliation claim. First, it argues that the FMLA does not provide for the type of intermittent adoption-related leave that he took. Second, Pfizer claims that Dotson did not request FMLA leave, and so a rational jury could not hold it liable for retaliating against him for exercising his FMLA rights. Third, Pfizer argues that Dotson could not show retaliatory animus by the persons who decided to fire him and that there was no evidence that the firing was pretextual.

1. *Intermittent Leave Under the FMLA*

The FMLA allows eligible employees 12 weeks of leave during any 12-month period "[b]ecause of the placement of a son or daughter with the employee for adoption or foster care." 29 U.S.C. § 2612(a)(1)(B).[1] An employee cannot take such leave intermittently "unless the employee and the employer . . . agree otherwise." *Id.* at § 2612(b)(1).

The parties do not dispute that Dotson took intermittent pre-adoption leave. Pfizer, though, suggests that Dotson's preadoption absences were taken intermittently without Pfizer's consent and thus fall outside the FMLA. Testimony showed, however, that Dotson kept the company informed of his need for adoption-related leave. In its brief, Pfizer acknowledged that other than for one work-related dinner, it permitted Dotson to take all of the leave that he requested. Pfizer claims that even though it allowed Dotson to take accrued leave intermittently, it could not have approved intermittent FMLA leave because he never specifically requested the use of intermittent FMLA leave.

Pfizer's argument fails because the FMLA does not require Dotson to specifically invoke its protections in order to benefit from it. Regulations promulgated by the Department of Labor "repeatedly emphasize that it is the employer's responsibility to determine the applicability of the

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[1] The parties stipulated that Dotson was an "eligible employee" under the FMLA.

FMLA and to consider requested leave as FMLA leave." *Price v. City of Fort Wayne*, 117 F.3d 1022, 1026 (7th Cir. 1997) (citing 29 C.F.R. § 825.303(b)). Read in context, subsection (b)(1) to § 2612 does not create an additional hurdle for employees asking for adoption-related leave beyond the requirement that they make a request or requests for leave that is intermittent. Instead, the statutory language makes it clear that employers may, at their option, require that employees take FMLA leave for certain reasons (birth, adoption or foster care placement under § 2612(a)(1)(A)-(B)) in one block of up to twelve weeks rather than intermittently. The requirement that employer and employee must "agree" on intermittent leave means that employers can refuse to allow this type of leave in birth, adoption and foster care placement cases. By contrast, employees have an unfettered right to take FMLA leave because of a serious health condition intermittently when "medically necessary," with or without employer consent.[2] 29 U.S.C. § 2612(a)(1)(C)-(D). When the provisions are read side by side in this manner, the requirement that employer and employee must "agree" on intermittent leave does not clash with the generally-accepted position that no "magic words" are necessary to invoke the protections of the FMLA. *See Sarnowski v. Air Brooke Limousine, Inc.*, 510 F.3d 398, 402 (3d Cir. 2007); *see also Rhoads v. F.D.I.C.*, 257 F.3d 373, 382-83 (4th Cir. 2001). Pfizer could not point to any evidence showing that it

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[2] Section 2612(b)(1) also states that, subject to several limitations, an employee has the right to intermittent leave under § 2612(a)(1)(E), which allows for time off for certain exigencies related to the active duty military service of a family member.

refused to allow Dotson to take adoption-related leave intermittently.

Courts that have allowed employers a defense based on the statute's requirement that the employer and employee "agree" on intermittent leave have done so when the employer expressly refused to agree to intermittent leave. *See Maynard v. Town of Monterey, Tenn.*, 75 Fed. Appx. 491, 493 (6th Cir. 2003); *Beyst v. Pinnacle Airlines, Inc.*, 2008 WL 2433201 at *7-8 (E.D. Mich., June 11, 2008) (granting an employer's motion for summary judgment on an "intermittent" FMLA claim where the employer expressly forbade intermittent leave in its Employee Handbook).[3]

Here, evidence showed that Pfizer agreed that Dotson could take his adoption-related leave intermittently. Dotson kept his supervisors informed about his need for adoption-related absences, which included two separate trips to Russia. No one at Pfizer suggested he could not take either trip. Dotson also contacted Pfizer's employee benefits contractor with questions related to his planned adoption. During the trial, he offered evidence that a Pfizer HR official misinformed him about available FMLA benefits, after which he did not seek to

[3] The plaintiff in *Beyst* did request, and was allowed, to take time off for incidents related to his newborn child. 2008 WL 2433201 at *7. The court refused to treat the employer's acquiescence to these intermittent leave requests as an agreement under § 2612(b)(1). *Id.* While such a finding may be understandable given the employer's explicit policy forbidding intermittent leave, we decline to accept language in the case suggesting that the plaintiff generally bears the burden of expressly invoking the FMLA.

designate any of his time off as FMLA-protected. The jury, then, heard evidence from which it could reasonably infer that Pfizer either granted Dotson's requests for intermittent adoption-related leave or failed to properly inquire concerning the designation of leave. If Dotson was improperly dissuaded from pursuing his FMLA options, he could not have come to an agreement on a more formal intermittent leave schedule.[4] In either case, Pfizer cannot now claim that it did not "agree" to allow Dotson to take the intermittent pre-adoption leave he requested and took.

2. *Request for FMLA Leave*

Pfizer submits that the district court should have granted judgment in its favor because no evidence suggested that Dotson applied for FMLA leave or exercised his FMLA rights. The company argues that it could not have intended to retaliate against Dotson for using his FMLA rights when he did not actually exercise those rights.

In addition to providing a substantive (or "prescriptive") right to unpaid leave in certain situations, the FMLA also provides proscriptive rights "that protect employees from discrimination

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[4] Because we find that Dotson has pointed to sufficient evidence showing that Pfizer either agreed to his intermittent adoption-related leave requests or misled him as to his eligibility for the FMLA, thus negating the possibility that he could come to a more formal agreement with Pfizer as to an intermittent leave schedule, we decline to address the district court's alternative rationale, based on the FMLA regulations contained at 29 C.F.R. §§ 825.203(b) and 825.112(d), for upholding the jury's finding.

or retaliation for exercising their substantive rights under the FMLA." *Yashenko v. Harrah's NC Casino Co.*, 446 F.3d 541, 546 (4th Cir. 2006) (citing *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 159-60 (4th Cir. 1998)). Section 2615 of the FMLA makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U.S.C. § 2615(a)(1). While the FMLA does not specifically forbid discharging an employee in retaliation for his use of FMLA leave, 29 C.F.R. § 825.220(c) states that employers are "prohibited from discriminating against employees or prospective employees who have used FMLA leave" and that "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions." Courts have recognized that the FMLA provides a cause of action for retaliation. *Blankenship v. Buchanan Gen. Hosp.*, 140 F. Supp. 2d 668, 671-72 (W.D. Va. 2001).

Relying principally on a case from the Eleventh Circuit, *Strickland v. Water Works & Sewer Bd.*, 239 F.3d 1199 (11th Cir. 2001), Pfizer argues that for Dotson to establish unlawful retaliation under the FMLA, he must show that Pfizer had notice that he was specifically invoking an FMLA right. Simply asserting that an employer had notice of an employee's need for leave for an FMLA-related reason, Pfizer suggests, cannot open the employer to FMLA retaliation liability.

Case law and federal regulations make it clear, however, that employees do not need to invoke

the FMLA in order to benefit from its protections. The regulations do not require the employee to "expressly assert rights under the FMLA or even mention the FMLA"; instead, the employee "may only state that leave is needed for an expected birth or adoption, for example." 29 C.F.R. § 825.302(c). After the employee makes such a statement, the responsibility falls on the employer to inquire further about whether the employee is seeking FMLA leave. *Id.* "In providing notice, the employee need not use any magic words." *Sarnowski*, 510 F.3d at 402.

There is no question that Dotson gave Pfizer adequate notice of his need for leave during the adoption process. After he provided this information, the burden shifted to Pfizer to determine whether he was requesting FMLA leave. Pfizer has not shown that it made any inquiry into whether his adoption-related leave should have been classified as protected under the FMLA. Pfizer's legal argument would allow it to use its own failure to determine whether leave should be designated as FMLA-protected to block liability for retaliation. We decline to allow an employer to take advantage of its own lapse in such a way.

Language in *Strickland* does appear to countenance the view that, for a retaliation claim to proceed, an employer must be on notice that an employee specifically invoked the protection of the FMLA. *See* 510 F.3d at 1207. In *Strickland*, the employee had an argument with his supervisor and then left work. The employee claimed that he told his supervisor and another individual responsible for

recording work absences that he was leaving because he was having trouble with his diabetes. *Id.* at 1202-03. On these facts, the court found that the employer did not have notice that the employee was taking FMLA-protected leave; it did, however, allow the employee to press a FMLA interference claim. Thus, the *Strickland* court appeared to embrace a higher burden for making a retaliation claim under the statute. In our view, any such elevated evidentiary burden contrasts with the applicable FMLA notice regulations, which do not differentiate between the notice required to make interference claims and other claims under the FMLA. To the extent that *Strickland* stands for a higher retaliation burden, we decline to follow it.

In contrast to the last-minute, confusing statements made by the employee in *Strickland*, however, Dotson gave clear and advance notice that he was pursuing adoption, an FMLA-qualifying event. His testimony could lead a reasonable jury to find that Pfizer was on notice that he was inquiring about his FMLA options and that Pfizer did not fulfill its duty to inquire about whether his leave should be classified as FMLA-protected. Dotson also proffered evidence showing that he asked about the FMLA and received incorrect or misleading advice from a Pfizer HR official that led him to believe the law could not benefit him. Thus, even if we accepted the higher standard for a retaliation claim implied in *Strickland*, we would still find that Dotson presented sufficient evidence for a reasonable jury to believe that he was improperly prevented from invoking his FMLA rights and fired in retaliation for actions that should have been protected under the statute. Pfizer

cannot use its own oversight to escape liability for retaliation by claiming it had no warning that the statute protected Dotson.

3. *Retaliatory Animus and Pretext*

In order to prevail on a FMLA retaliation claim, Dotson must have shown evidence linking the adverse employment action taken against him to a "protected activity," in this case his adoption-related leave. *See Yashenko v. Harrah's NC Casino Co.*, 446 F.3d 541, 551 (4th Cir. 2006) (analyzing FMLA retaliation claim under Title VII framework). When we review a finding of retaliation after a full trial on the merits, "our sole focus is 'discrimination *vel non*' — that is, whether in light of the applicable standard of review the jury's finding of unlawful retaliation is supportable." *Cline v. Wal- Mart Stores, Inc.*, 144 F.3d 294, 301 (4th Cir. 1998) (quoting *Jiminez v. Mary Washington Coll.*, 57 F.3d 369, 377 (4th Cir. 1995)).

Pfizer's position at trial was that it fired Dotson because his delivery of a starter to an orphanage in Russia created the impression of a *quid pro quo*, which could have had serious legal repercussions for Pfizer. This non-discriminatory explanation, if believed by the jury, would have rebutted Dotson's prima facie case of retaliatory firing.[5] Following the burdenshifting framework of

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[5] In deciding Pfizer's motion for summary judgment, the district court found that Dotson made out a prima facie case of retaliation based on the timing of his firing under *Williams v. Cerberonics*, 871 F.2d 452, 457 (4th Cir. 1989). This finding was not challenged on appeal.

McDonnell Douglas, which allows a finding of discrimination when the supposedly nondiscriminatory reason for termination is shown to be pretextual, Dotson then put on evidence to show that Pfizer's reasons for firing him were a mere pretext for unlawful discrimination. *See Yashenko*, 446 F.3d at 551 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-06 (1973)).

Pfizer now argues that Dotson failed to prove retaliation at trial for two reasons: first, he did not show that any member of the group of Pfizer executives that made the decision to fire him bore any retaliatory animus toward him for his adoption-related leave; second, Dotson did not show that the reason Pfizer gave for firing him was pretextual. We believe, to the contrary, that under the standard of review for a JMOL decision, Dotson put on sufficient evidence to allow a jury to find both retaliatory animus and pretext. Because the evidence in the record before us shows that a jury could rationally find that Pfizer's stated reason for firing Dotson was pretextual, we decline to address Pfizer's first argument in any detail.[6]

Dotson put on sufficient evidence of weaknesses and inconsistencies in Pfizer's account of its decision to fire him for a jury to find pretext. *See Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997); *Blankenship v. Buchanan Gen. Hosp.*, 140

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[6] It is worth noting, however, that on cross-examination, McElerney — a member of the executive group that made the decision to fire Dotson — expressed his frustration at Dotson for missing a deadline due to an adoption-related trip to Russia.

F. Supp. 2d 668, 674 (W.D. Va. 2001). First, Pfizer's starter policies were not so clearly drawn that Dotson's handling of starters was obviously wrongful. Dotson put on evidence showing that some Pfizer personnel were unaware that NHO division employees could not handle starters. Most importantly, none of the Pfizer employees who knew in advance about Dotson's plan to donate the Zithromax starters — including Kennedy, his direct supervisor, and McElerney, a member of the executive group that fired Dotson — took any action to stop him from donating the Zithromax. Neither Kennedy nor McElerney was disciplined for failing to stop him. A jury could rationally conclude that if such a donation constituted a violation serious enough to merit permanent dismissal, Pfizer higher-ups would have known to stop Dotson from going forward with it or, alternatively, would have suffered some consequence for their inaction.

The evidence also showed that the other two persons directly involved in obtaining starters for Dotson were not disciplined. Pfizer argues that the level of misconduct by these two persons and Dotson's two supervisors on one hand, and Dotson on the other, were quite different and should not be weighted equally under *Moore v. City of Charlotte*, 754 F.2d 1100, 1107 (4th Cir. 1985). Even if the conduct was not precisely analogous, of the five persons involved directly or tangentially in mishandling starters, one was fired and the other four were not disciplined at all. That fact, taken in combination with other Pfizer employees' confusion over the company's starter policies and the timing of Dotson's firing, could lead a reasonable jury to find

that Dotson's firing under these circumstances was pretextual.

B.

Pfizer suggests that the district court should have granted its motion for JMOL on Dotson's claim for FMLA interference because Dotson did not show that he incurred actual damages as a result of any interference with his rights under the FMLA. Dotson, however, put on sufficient evidence for a jury to find that he suffered a cognizable injury because of Pfizer's interference.

Dotson incurred actual damages when he was asked to work while traveling to Russia on leave that should have been FMLA-protected — work for which Pfizer did not give him a full day's credit. Had Pfizer treated the day Dotson spent working as a work day, rather than as paid vacation, Dotson would have been paid for an additional day of accrued vacation when he was terminated. A day's paid vacation is not valueless; it is a tangible employment benefit providing full pay for a day when no work is performed. As such, it should be considered a form of compensation subject to valuation. The section outlining damages for FMLA interferences explains that employers are liable for damages in "the amount of any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation." 29 U.S.C. § 2617(a)(1)(A)(i)(I). In our opinion, the "amount" of "employment benefits" or "other compensation" lost here is equal to the amount Dotson would have been paid on a day of paid vacation. While Dotson has

raised a number of arguments that would support a finding of damages, the loss of paid vacation is sufficient to overcome any damages-based hurdle to an FMLA interference claim.

C.

During the trial, Pfizer introduced evidence, discovered after the commencement of litigation, of what it claimed were Dotson's misrepresentations to Pfizer personnel regarding the doctor's signatures he obtained on the forms used to track starter distribution. During the performance review held in October 2003, Dotson's two immediate supervisors instructed him to contact Pfizer's Starter Administration Department to further discuss his distribution of starter drugs in Russia and North Carolina. Pfizer's evidence showed that during Dotson's conversation with Jim Batura ("Batura"), a Pfizer employee Dotson reached on the "compliance hotline," Dotson told Batura that he had received a signature from his family pediatrician, a Dr. Foster, acknowledging receipt of the Zithromax that he eventually donated to the Russian orphanage. Batura determined that while Dotson's actions may have violated Pfizer policy, they did not constitute a reportable offense under the PDMA.

During the course of litigation, Pfizer realized that Dr. Foster dated her signature after Dotson's trip to Russia. It questioned Dotson about the timing of the signature; Dotson then claimed that a Dr. Rusher had signed for the Zithromax prior to Dotson's trip to Russia, but that he had lost the starter form and sought a replacement form from Dr.

Foster after he returned. In an affidavit, Dr. Rusher testified that he had no recollection of discussing Dotson's plan to donate the Zithromax or of signing a starter form. After receiving this new information, Batura determined that he had a duty to report several of Dotson's misrepresentations to the FDA. Pfizer argued that it would have fired Dotson for these misrepresentations, independent of its stated reason for terminating him in November 2003. After the jury returned its verdict, which indirectly indicated that it credited Pfizer's defense, Dotson moved for judgment as a matter of law on the after-acquired evidence defense.[7]

An after-acquired evidence defense limits an employer's liability when the employer discovers evidence of "wrongdoing . . . of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362-63 (1995). In evaluating an after-acquired defense, a court "must

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[7] The amount of damages awarded by the jury indicated that it cut off back pay at or around the date on which Pfizer disclosed Dotson's alleged misrepresentations to the FDA — not, as normally required when an after-acquired defense is credited, at the time the new evidence was discovered. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362 (1995). The jury did not make a separate finding on the defense. The after-acquired evidence defense became an important issue on appeal because Pfizer argued that the jury's acceptance of its defense would provide an alternative ground for the district court's decision denying front pay. *See Wallace v. Dunn Constr. Co.*, 62 F.3d 374, 380 (11th Cir. 1995). We conclude that the district court did not abuse its discretion in denying front pay, and so have no need to determine whether the jury "credited" Pfizer's defense.

look to the employer's actual employment practices and not merely the standards articulated in its employment manuals." *Sellers v. Mineta*, 358 F.3d 1058, 1064 (8th Cir. 2004) (citing *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 759 (9th Cir. 1996)).

Dotson argues that the district court should have rejected Pfizer's after-acquired evidence defense because the evidence "acquired" was in Pfizer's possession before his termination and, in any event, Dotson's alleged conduct would not normally have warranted discharge. He emphasizes a note from Kennedy to McElerney pointing out a discrepancy in the timing of Dotson's starter authorizations. Dotson contends that this note shows that Pfizer was aware of the starter problem, allegedly uncovered during the discovery process, before it fired Dotson.

What was discovered during Dotson's deposition, however, was that he had misled Batura, the starter compliance official, by telling him that Dr. Foster had signed a starter form prior to Dotson's trip to Russia. This conversation, Pfizer claims, led it to refrain from contacting the FDA to report a problem with its handling of starters. Dotson's argument that the evidence is not truly "after-acquired" is specious. His supervisors, who may have known that something was amiss with Dotson's starter forms, directed him to call Pfizer's compliance department. Pfizer put on evidence showing that Dotson misled a compliance official and that the extent of the purported deception did not become clear until after litigation began and Pfizer

obtained a new explanation from Dotson, which it later discovered was also questionable. The evidence was "after-acquired": Dotson's misleading of Batura was revealed only after Dotson filed suit.

The second question, which we decide using the same standard as the trial judge, is whether a reasonable jury could have found for Pfizer on its claim that it would have terminated Dotson for his allegedly misleading conversation with Batura. Pfizer argues that it would have terminated an employee for misrepresenting material facts to a company official investigating starter misuse. At trial, Pfizer introduced the testimony of Dawn Rogers, the Human Resources Vice President for Pfizer, who stated that Dotson would have been terminated based on what Pfizer discovered after the commencement of litigation. We conclude that this testimony would allow a reasonable jury to agree with Pfizer on this element of its after-acquired evidence defense, and so the district court correctly denied Dotson's motion for judgment as a matter of law.

Because we reject Dotson's assertion that the district court should have granted his motion for judgment as a matter of law on Pfizer's after-acquired evidence defense, it is clear that the court did not abuse its discretion in allowing Pfizer to amend its Answer or in denying Dotson's motion in limine to exclude the evidence from trial.

III.

Both parties question the district court's decisions related to damages and compensation. Pfizer appeals the liquidated damages award and argues that the court awarded excessive attorneys' fees in light of Dotson's limited recovery. Dotson claims that he is entitled to pre-judgment interest, front pay, and additional attorneys' fees.

We review a district court's rulings on questions of damages for abuse of discretion. *Doe v. Chao*, 511 F.3d 461, 467 (4th Cir. 2007); *Hite v. Vermeer Mfg. Co.*, 446 F.3d 858, 868- 69 (8th Cir. 2006); *Duke v. Uniroyal Inc.*, 928 F.2d 1413, 1424 (4th Cir. 1991). The district court "abuses its discretion only if its conclusions are based on mistaken legal principles or clearly erroneous factual findings." *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 370 (4th Cir. 2001) (citation omitted).

A.

Dotson appeals the district court's denial of his request for front pay. He asked for approximately $8 million in front pay, including lost future earnings and benefits stretching fifteen years into the future — until, as Dotson explained, a planned early retirement at age 58.

Under the FMLA, a wronged employee is entitled to "such equitable relief as may be appropriate, including employment, reinstatement, and promotion," along with damages. 29 U.S.C. §

2617(a)(1)(B). The statute does not identify front pay as an equitable remedy, but we have recognized it as a proper form of relief that is "an alternative and complement to reinstatement." *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 307 (4th Cir. 1998). Determinations of front pay are made by the trial court sitting in equity. *Id.* at 307 (citing *Duke v. Uniroyal*, 928 F.2d 1413, 1424 (4th Cir. 1991)). A trial court must "temper" the use of front pay by recognizing "the potential for windfall" to the plaintiff. *Duke*, 928 F.2d at 1424. We review the denial of an award of front pay for abuse of discretion. *See Nichols v. Ashland Hosp. Corp.*, 251 F.3d 496, 504 (4th Cir. 2001).

The district court believed that front pay from the date of termination until Dotson's planned retirement was simply too speculative to award. The court cited *Peyton v. Dimario*, a Title VII case which held that front pay for 26 years was unduly speculative; the *Peyton* Court also noted that the balance of authority suggested that courts disfavored lifetime front pay awards for plaintiffs in their forties. *Peyton v. Dimario*, 287 F.3d 1121, 1129-30 (D.C. Cir. 2002). The district court stated that it would have been inclined to award front pay for a more limited duration — such as the approximately three years between Dotson's termination and the point at which he secured a similar though lesser-paying job at GlaxoSmithKline — had the jury's award plus liquidated damages not made Dotson whole by covering his projected losses over those three years.

Dotson objects to the district court's characterization of what he claimed would be uninterrupted future employment with Pfizer as speculative. He also disputes its determination that liquidated damages made him whole for his future losses. Dotson suggests that, since he has not found a position as remunerative as the one he held with Pfizer, he will not be "made whole" unless he receives compensation to make up the difference, starting at the date of his termination and looking more than a decade into the future.

Under these circumstances, we do not believe the district court abused its discretion in denying Dotson front pay. At the time the court ruled on Dotson's request for front pay, Dotson had secured full-time employment in the pharmaceutical services industry, making approximately $65,000 less than the approximately $232,000 in salary and benefits he made prior to his termination. Thus, he had secured comparable, if not precisely equivalent, work at another major drug company.

Dotson goes to great lengths to show that front pay in his case would not be unduly speculative. The speculative nature of the inquiry, though, does not stem just from the question whether Dotson would have stayed with Pfizer through the end of his career had he not been fired. It also necessarily involves speculation as to what Dotson's post-termination future holds. The court was within its discretion to refuse to assume that Dotson would never earn a salary comparable to what he made at Pfizer, given his relative youth and education level. Considering that (1) the

determination of front pay is inherently speculative; (2) Dotson was of a relatively young age when terminated; (3) he is highly educated and experienced; and (4) he sought front pay from the date of his termination until the date he claims he would have retired, fifteen years in the future, we cannot say that the district court abused its discretion in denying front pay.

Finally, Dotson finds error in the court's consideration of the role played by the liquidated damages in making him whole. If, as he argues, the remedial intent of the FMLA is to make wronged employees whole, it is difficult to understand why a lower court cannot consider the role of liquidated damages in reaching this overarching goal. Other courts have allowed such a consideration, although some have cautioned that the award of liquidated damages should play only a minor role in determining whether front pay is appropriate. *See, e.g.*, *Palasota v. Haggar Clothing Co.*, 499 F.3d 474, 490-91 (5th Cir. 2007); *Downes v. Volkswagen of America., Inc.*, 41 F.3d 1132, 1141 (7th Cir. 1994). Given the relatively short gap of two years that the court observed between Dotson's termination and his securing of roughly comparable employment, the court's consideration of liquidated damages in making Dotson whole was not an abuse of discretion.

B.

Dotson also claims that the district court improperly refused to award pre-judgment interest. Under the FMLA, an employer "shall be liable" for the pre-judgment interest on the amount of "any

wages, salary, employment benefits, or other compensation denied or lost to [an employee] by reason of the [FMLA] violation." 29 U.S.C. § 2617(a)(1)(A)(i)-(ii); *see also Hite v. Vermeer Mfg. Co.*, 446 F.3d 858, 869 (8th Cir. 2006) (interpreting § 2617 to require pre-judgment interest).[8] The district court explained that it did not award pre-judgment interest because Dotson did not request it in the initial post-trial proceedings. Dotson did, however, request pre-judgment interest in his complaint and in a pre-trial brief. He raised the issue again in a Rule 59 motion to amend the district court's judgment on damages.[9] In its Memorandum Opinion

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[8] There is a discrepancy between the mandatory language of § 2617 and the permissive formulation of one regulation addressing FMLA remedies, which states that "the employee may be entitled to interest" on FMLA damages. 29 C.F.R. § 825.400(c). Here, as always, the plain meaning of the unambiguous statute controls. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988) (citing *Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

[9] Pre-judgment interest is considered to be part of the merits of a court's decision, and so a motion requesting such interest is properly classified as a Rule 59(e) motion to alter or amend a judgment. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 176-77 & n.3 (1989); *see also Kosnoski v. Howley*, 33 F.3d 376, 378 (4th Cir. 1994). We have previously required, in an unpublished opinion, that to avoid waiving pre-judgment interest, a litigant must raise the issue within the time constraints imposed by Rule 59(e), which allows no more than 10 days to file a motion to alter or amend a judgment. *Hanson v. Cerrone & Assoc., Inc.*, 1993 WL 98777, at *3 (4th Cir. Apr. 15, 1993); *but see Macsenti v. Becker*, 237 F.3d 1223, 1245 (10th Cir. 2001) (finding no authority requiring a litigant to raise the issue of entitlement to pre-judgment interest via a Rule 59(e) motion to preserve an appeal when the issue was raised in the complaint). Here, the

deciding the parties' initial post-trial motions, the district court stated, in a footnote, that while pre-judgment interest "may also be awarded," Dotson had not asked for it in his initial post-trial brief. Mem. Op. of Aug. 29, 2007, at 3 n.2. For that reason, the district court denied Dotson's subsequent request for prejudgment interest, made under Rule 59(e), as untimely. Mem. Op. of Nov. 19, 2007, at 3-5. In support of this finding, the court reasoned that pre-judgment interest constituted "additional" relief that would have required briefing within the schedule that it set for post-trial motions. *Id.* at 5.

We reverse the district court's decision because prejudgment interest on FMLA damages is mandatory rather than discretionary. Pre-judgment interest also does not constitute the kind of "additional" relief that requires briefing — unlike other FMLA remedies like front pay and liquidated damages, which the district court has the discretion to reduce or deny outright. Pre-judgment interest automatically becomes part of the damages award under the plain terms of the statute. 29 U.S.C. § 2617(a)(1)(A)(i)-(ii). Given the statutory command to include pre-judgment interest as part of FMLA damages, the district court should have awarded

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district court awarded judgment for damages and costs in two stages: first, it entered the jury award for retaliation and interference; second, the court invited briefing on other damages and costs to which Dotson might be entitled. The court then entered a second order awarding liquidated damages, attorneys' fees, and costs, and denying front pay. Dotson filed his Rule 59(e) motion for pre-judgment interest within 10 days of the entry of this second order. He did not waive pre-judgment interest, and so the district court's decision is ripe for review.

pre-judgment interest regardless of whether Dotson reiterated his pre-trial requests for it in the post-trial motion. In this case — where prejudgment interest was requested in several documents filed before trial — Dotson was entitled to the interest, which should have been awarded at the time the district court awarded him liquidated damages and other costs and fees.[10]

Pfizer's arguments in opposition lack merit. The case it cites to support its assertion that pre-judgment interest is discretionary addresses a different statute — one that does not provide for pre-judgment interest. *See Eden v. Amoco Oil Co.*, 741 F. Supp. 1192, 1196 (D. Md. 1990). We also reject Pfizer's contention that Dotson was made whole without prejudgment interest. Regardless of whether a court believes that a plaintiff is made whole by a jury award alone, the FMLA requires the award of pre-judgment interest. In effect, Congress has stipulated as to what will make a wronged employee whole under the FMLA, and we are bound by that legislative decision.

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[10] The district court noted that pre-judgment interest is not warranted automatically, at least insofar as the rate of interest is not defined by statute and different courts use different interest calculations. The question whether Dotson was entitled to pre-judgment interest, though, is separate from the question of what rate applies. The court could have found that Dotson was at least entitled to this relief without briefing — even if determining the appropriate interest rate would require additional briefing.

C.

The FMLA entitles a wronged employee to an additional award of liquidated damages equal to the sum of the amount awarded for damages and the interest on that amount. 29 U.S.C. § 2617(a)(1)(A)(iii). Normally, liquidated damages are awarded automatically under the statute. If, however, the employer "proves to the satisfaction of the court" that the violation of § 2615 "was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation," the court, in its discretion, may choose not to award liquidated damages. *Id.* The employer has a "plain and substantial burden" to persuade the court that its failure was in good faith and that it would be unfair to impose liquidated damages. *Mayhew v. Wells*, 125 F.3d 216, 220 (4th Cir. 1997) (quotation omitted) (interpreting liquidated damages provision of the Fair Labor Standards Act). The employer must show objective good faith. *See id.* (citing *Clifton D. Mayhew, Inc. v. Wirtz*, 413 F.2d 658, 661-62 (4th Cir. 1969)).

Pfizer's decision-makers, the company contends, did not know that Dotson had inquired about FMLA leave, and so the district court punished Pfizer for not knowing the statutory implications of Dotson's adoption-related leave. This argument ignores Pfizer's statutory burden of seeking out further information and complying with the FMLA when an employee indicates that he or she is seeking leave for a protected reason. *See* 29 C.F.R. § 825.303(b). Pfizer had affirmative obligations it did not meet. The district court was

well within its discretion to find that Pfizer did not make a showing of good faith.

Our decision that Dotson is entitled to pre-judgment interest, however, requires that we vacate the award of liquidated damages and return it to the district court for recalculation after the addition of pre-judgment interest. *See supra* at subsection III.B; 29 U.S.C. § 2617(a)(1)(A)(ii)-(iii) (prescribing liquidated damages equal to the sum of damages and prejudgment interest).

D.

Both parties contest the attorneys' fees awarded to Dotson's counsel. Pfizer claims that the amount of attorneys' fees awarded — $375,000 — was excessive considering that Dotson recovered $666,610.50 on his claims.

The FMLA directs the award of reasonable attorneys' fees to a prevailing plaintiff. 29 U.S.C. § 2617(a)(3); *see McDonnell v. Miller Oil Co.*, 134 F.3d 638, 640 (4th Cir. 1998). The amount of attorneys' fees awarded is at the trial court's discretion. *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1359 (4th Cir. 1995) (citing *Rum Creek Coal Sales v. Caperton*, 31 F.3d 169, 174 (4th Cir. 1994)). A reviewing court should reverse discretionary fee awards only "if under all the facts and circumstances [the award] is clearly wrong." *Id.* (citation and quotation omitted) (alteration in original). In calculating a reasonable lodestar fee, the district court looks to "the nature and extent of the services supplied, the customary hourly rate of compensation, the number of hours

expended, the skill required, the complexity of the case, and the success achieved by the plaintiff." *Id.* (citing *Rum Creek Coal Sales*, 31 F.3d at 175). The reasonable number of hours and reasonable rate is determined by reference to the twelve factor test set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974). *See, e.g.*, *McDonnell*, 134 F.3d at 640.

Pfizer claims that, because it prevailed on its after-acquired evidence defense, Dotson won only a limited victory. Thus, the Court should reduce the attorneys' fees awarded, because "the most critical factor is the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). "Even when an award of attorneys' fees is mandatory, the district court may decrease the amount of fees that might otherwise be awarded in order to account for the plaintiff's limited success." *McDonnell*, 134 F.3d at 641. Here, the district court reduced the amount claimed by Dotson's attorneys from $550,000 to $375,000. Even if Pfizer prevailed, or partially prevailed, on the after-acquired evidence defense it raised, we do not find the district court's attorneys' fee award "clearly wrong." *Martin*, 48 F.3d at 1359. The court properly took into account Dotson's limited recovery and reduced the fee award accordingly.

The district court limited Dotson's attorneys' fees because he did not obtain all the relief requested in his complaint. Dotson claims he is entitled to higher attorneys' fees, since the district court wrongfully denied Dotson the full relief he requested. Because we hold that the district court did not abuse its discretion in denying front pay, it is

clear that the court also did not err by limiting Dotson's fees based on his failure to recover front pay.

In its post-trial ruling on Dotson's motion to amend the judgment, the district court denied Dotson's request for additional attorneys' fees without prejudice, allowing him to renew his request "upon conclusion of the appellate process in his favor." Mem. Op. of November 19, 2007, at 7. Our decision that Dotson should have been awarded pre-judgment interest — which will require a re-calculation of liquidated damages — means that Dotson will make a larger overall recovery on his legal claims. In accordance with the district court's earlier decision, we vacate the attorneys' fee award and return it to that court for reconsideration based on Dotson's additional recovery.

IV.

To recapitulate, we hold that Dotson is entitled to prejudgment interest under 29 U.S.C. § 2617(a)(1)(A)(i)-(ii). For that reason, the attorneys' fees and liquidated damages must be recalculated after pre-judgment interest is added to Dotson's award. We affirm the district court's judgment in all other respects.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED

FILED: March 4, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1920 (L)
(5:04-cv-00722-BR)

JAMES D. DOTSON,

Plaintiff - Appellee

v.

PFIZER, INCORPORATED,

Defendant - Appellant

No. 07-1979
(5:04-cv-00722-BR)

JAMES D. DOTSON,

Plaintiff - Appellant

v.

PFIZER, INCORPORATED,

Defendant - Appellee

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed in part, reversed in part, and vacated in part. This case is remanded to the District Court for further proceedings consistent with the Court's decision.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:04-CV-722-BR

JAMES D. DOTSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
PFIZER, INC.,	)	
	)	
Defendant.	)	

This matter is before the court on the parties' various post-trial motions. They have been fully briefed and are ripe for disposition.

I. BACKGROUND

By way of pertinent background, on 30 September 2004, plaintiff James D. Dotson filed this action asserting claims under the Family Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601 et seq., against his former employer, defendant Pfizer, Inc. (Pfizer). Specifically, Dotson claimed that Pfizer interfered with his attempts to take adoption-related leave and that his termination from Pfizer's employment was retaliatory for taking that leave. The court denied Pfizer's motion for summary judgment on 10 March 2006, and in May 2006, for eight days, the case was tried before a jury. While the jury was deliberating, the court heard evidence

related to front pay. The jury found in favor of Dotson on his interference and retaliation[1] claims, awarding him $1876.00 and $331,429.25, respectively.

The various pending motions concern Pfizer's motion for judgment as a matter of law or for a new trial pursuant to Fed. R. Civ. P. 50 and 59 and additional relief Dotson seeks, namely liquidated damages, front pay, attorneys fees, and costs.

II. DISCUSSION

Defendant's Motion for Judgment as a Matter of Law or for a New Trial

In assessing Pfizer's Rule 50 motion, viewing the evidence in the light most favorable to Dotson, the court must examine whether there was sufficient evidence for a reasonable jury to find in Dotson's favor. See Bryant v. Aiken Regional Medical Ctrs. Inc., 333 F.3d 536, 543 (4th Cir. 2003), cert. denied, 540 U.S. 1106 (2004). "When a jury verdict has been returned, judgment as a matter of law may be granted if . . . the only conclusion a reasonable jury could have reached is one in favor of the moving party." International Ground Transportation, Inc. v. Mayor & City Council of Ocean City, Md., 475 F.3d 214, 218-19 (4th Cir. 2007) (citation omitted). Alternatively, Pfizer requests a new trial on all Dotson's claims pursuant to Rule 59. On a motion for

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[1] The jury found in Pfizer's favor as to Dotson's retaliation claim based on his need to care for his daughter with a serious health condition.

a new trial, the district court may weigh the evidence and should grant a new trial only if "1) the verdict is against the clear weight of the evidence, 2) is based on evidence which is false, or 3) will result in a miscarriage of justice." Bryant, 333 F.3d at 543 (citation omitted).

The court has thoroughly examined the arguments Pfizer raises in the instant motion as well as those raised in its previous filings and concludes Pfizer is not entitled to judgment as a matter of law or a new trial.

Liquidated Damages

Dotson seeks liquidated damages pursuant to 29 U.S.C. § 2617(a)(1)(A)(iii). That section provides that an employer who violates the FMLA shall be liable, in addition to back pay, for an equal amount as liquidated damages.[2] 29 U.S.C. § 2617(a)(1)(A)(iii). An award of liquidated damages to a successful employee is the norm. See Hite v. Vermeer Manufac. Co., 446 F.3d 858, 868 (8th Cir. 2006) (referring to § 2617(a)(1)(A)(iii) as an "'otherwise mandatory call for liquidated damages'" (quotation omitted)); Nero v. Industrial Molding Corp., 167 F.3d 921, 929 (5th Cir. 1999) ("Doubling of an award is the norm under the FMLA, because a plaintiff is awarded liquidated damages in addition to compensation lost."); Mayhew v. Wells, 125 F.3d 216, 220 (4th Cir. 1997) (recognizing that liquidated

[2] Prejudgment interest may also be awarded and included in the liquidated damages calculation, see 29 U.S.C. § 617(a)(1)(A)(ii)-(iii), but Dotson has not moved for nor does he argue he should recover any such interest.

damages for violations of Fair Labor Standards Act's (FLSA)[3] minimum wage and overtime provisions "are the norm").

The employer may, however, escape liability for liquidated damages if it "proves to the satisfaction of the court that the act or omission which violated [the FMLA] was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of [the FMLA]." 29 U.S.C. § 2617(a)(1)(A)(iii). The employer bears "a 'plain and substantial burden' . . . to persuade the court that the 'failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict." Mayhew, 125 F.3d at 220; see also Hite, 446 F.3d at 868 ("To avoid a liquidated damages award, the defendant bears the burden of establishing that it acted with subjective[4] good faith and that it had an objectively reasonable belief that its conduct did not violate the law." (citation omitted)); Nero, 167 F.3d at 928 n.3 (employer has "the substantial burden" of proving it acted in good faith).

Pertinent to the issue of Pfizer's liability for liquidated damages, the court submitted an advisory

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[3] Courts have looked to the [FLSA] in interpreting the FMLA because it appears that Congress substantially patterned the FMLA on the FLSA." Keene v. Rinaldi, 127 F. Supp. 2d 770, 772 (M.D.N.C. 2000) (citations omitted).

[4] The Fourth Circuit requires objective good faith. See Mayhew, 125 F.3d at 220.

question to the jury.[5] The jury answered in the negative: "Did defendant act in good faith and with the reasonable belief that its action complied with the FMLA?" The court agrees with the jury's assessment and will award liquidated damages on the interference and retaliation claims.

With respect to Pfizer's conduct in conjunction with the interference claim, the jury obviously believed Dotson's version of his conversation about taking FMLA leave with one of Pfizer's human resource employees, Amy Burnell. Dotson testified that Burnell told him he was required to exhaust his vacation leave before he could take FMLA leave. Accepting Dotson's testimony as true, Pfizer offers no explanation for the conduct, other than characterizing it as a "good faith miscommunication." (Resp. Opp'n to Pl.'s Mot. for Liq. D. at 21-22.) If true, then Pfizer gave Dotson incorrect advice, and it has not shown that it had reasonable grounds for believing it was not violating the FMLA. Cf. Dillon v. Maryland-National Capital Park & Planning Comm'n, 382 F. Supp. 2d 777, 792-93 (D. Md. 2005) (while employer's conclusion regarding employee's eligibility for FMLA leave to care for her grandmother might ultimately be erroneous, employer met burden of showing it acted in good faith and had reasonable grounds for believing it acted properly by considering the possibility that employee's leave request may have been covered under the FMLA and bending over backwards to give the leave request consideration);

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[5] The parties agreed that the jury's finding on the issue was merely advisory and that the court will ultimately resolve the issue.

Miller v. AT&T Corp., 83 F. Supp. 2d 700, 709 (S.D. W. Va. 2000) (although employer incorrectly determined that flu is not a "serious health condition" based on regulation which states "'Ordinarily, unless complications arise . . . the flu . . . etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave,'" employer acted in good faith and had reasonable grounds for believing the FMLA did not apply), aff'd, 250 F.3d 820 (4th Cir. 2001).

On the retaliation claim, the jury found that Dotson proved Pfizer was motivated by an intentionally illegal retaliatory purpose. Pfizer argues that it should not be held liable for liquidated damages because the decision makers involved in Dotson's termination did not know that Dotson was seeking FMLA protection and, in any event, they were acting in good faith. (Resp. Opp'n to Pl.'s Mot. for Liq. D. at 20-24.) If the court were to accept or adopt these arguments, many of which Pfizer raises as a basis for its motion for judgment as a matter of law, the court in effect would negate the jury's finding of intentional retaliation. See Hite, 446 F.3d at 869 ("Showing good faith when a jury has determined intentional retaliation is a very high bar to clear, if indeed it can be."). Pfizer has not met its burden of showing good faith and reasonable grounds for its acts.

The court will award Dotson liquidated damages in the amount of $333,305.25, which is the total of the jury awards on the interference and retaliation claims.

C. Front Pay

Dotson seeks approximately $8 million in front pay, which includes lost future earnings and benefits over a period of fifteen years. (Pl.'s Proposed Findings Fact & Conclusions Law at 15-16.) Under the FMLA, a prevailing employee is entitled to "such equitable relief as may be appropriate, including employment, reinstatement, and promotion." 29 U.S.C. § 2617(a)(1)(B). Front pay, although not specifically identified in the statute, is considered an appropriate form of equitable relief, "as an alternative or complement to reinstatement."[6] Cline v. Wal-Mart Stores, Inc., 144 F.3d 294, 307 (4th Cir. 1998). "The award of front pay rests squarely within the district court's discretion, which must be 'tempered' by 'the potential for windfall' to the plaintiff." Nichols v. Ashland Hosp. Corp., 251 F.3d 496, 504 (4th Cir. 2001) (citations omitted). The purpose of such an award, in combination with other remedies, is to make the plaintiff whole. Duke v. Uniroyal, Inc., 928 F.2d 1413, 1423 (4th Cir.), cert. denied, 502 U.S. 963 (1991).

Simply put, front pay is future earnings. The Family and Medical Leave Act § 11.III.B.2.b Gail V. Coleman ed., ABA Supp. 2006).

> [F]ront pay is the functional equivalent of reinstatement because it

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[6] While reinstatement is preferred, Duke v. Uniroyal, Inc., 928 F.2d 1413, 1424 (4th Cir.), cert. denied, 502 U.S. 963 (1991), neither party suggests it as a remedy, and the court agrees that such relief is inappropriate under the circumstances.

is a substitute remedy that affords the plaintiff the same benefit (or as close an approximation as possible) as the plaintiff would have received had []he been reinstated.

. . . .

. . . . Front pay gives the employee the earnings []he would have received had []he been reinstated to h[is] old job. But since the employee has a duty to mitigate damages, []he may have taken another job in the interim (or be expected to find another job soon). Giving the employee the earnings from h[is] old job without taking account of h[is] earnings from h[is] new (or expected) job would result in overcompensation. Thus, the front pay award gives the employee the present value of the earnings from h[is] old job less the earnings from h[is] new (or expected) job.

In determining earnings from the employee's new or expected job for the purposes of calculating front pay, the court terminates the inquiry at the point at which the plaintiff finds employment comparable or superior to h[is] old job. Once the plaintiff finds such employment, the damages from h[is] unlawful termination- at least, the damages that reinstatement/front pay

> are designed to remedy- are mitigated down to zero. This is the reason why front pay awards are limited in duration.
>
> Limiting the duration of front pay awards also helps to replicate the effects of reinstatement. Reinstated employees are not necessarily expected to stay in their positions indefinitely. Just as a reinstated employee may be expected to leave his or her position for comparable or better employment, an employee receiving front pay in lieu of reinstatement is entitled to front pay only until such time that the employee can reasonably be expected to have moved on to similar or superior employment.

Williams v. Pharmacia, Inc., 137 F.3d 944, 952-53 (7th Cir. 1998) (Title VII case) (citations omitted).

"In deciding whether to award front pay, the court considers such factors as whether the plaintiff has a reasonable prospect of obtaining comparable employment, whether the time period for the award is relatively short, whether the plaintiff intended to work or was physically capable of working and whether liquidated damages have been awarded."[7]

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[7] Because liquidated damages under the FMLA are compensatory, rather than punitive, in nature, Rhoads v. FDIC, 956 F.Supp. 1239, 1263 (D. Md. 1997), rev'd in part on other grounds, 257 F.3d 373 (4th Cir. 2001); see also Roy v. County of Lexington, SC, 141 F.3d 533, 548 (4th Cir. 1998)

Downes v. Volkswagen of Am., Inc., 41 F.3d 1132, 1141 (7th Cir. 1994) (ADEA case) (citations omitted). Here, at the time of his termination in 2003, Dotson was 41 years old and had worked for Pfizer for fifteen years. (5/25/06 Afternoon Session Only Tr. at 6-7.) He intended to retire from Pfizer at the age of 58 or 59 (fifteen years from the date of the trial). (Id. at 7.) At the time of his termination, Dotson earned $200,000[8] annually. (Id. at 9.) Since his termination, in 2004, 2005, and 2006, he earned from consulting $53,000, $59,000, and $122,000,[9] respectively. (Id.) Dotson averaged his losses in income for 2004-2006 and used this figure, $134,000, to calculate lost future earnings for 15 years: $2 million. (Id. at 9-10.)

(FLSA case), the court considers it particularly appropriate to consider such damages.

[8] All figures in this section are approximate.

[9] At the time, Dotson testified he had actually made $61,000, but for purposes of his calculations, he assumed he would make this same amount over the remainder of the year, or $122,000 in total wages. (5/25/06 Afternoon Session Only Tr. at 9.)

While employed by Pfizer, Dotson was entitled to a number of benefits. His annual insurance benefits totaled $15,000. (Pl.'s 6/19/06 Notice of Filing, Proscia Dep. at 53, 55, 56, 58.) Under Pfizer's retirement annuity plan, had he continued to work for Pfizer until retirement, he would have received a lump sum of $1.4 million. (5/25/06 Afternoon Session Only Tr. at 30-31.) Dotson also participated in the company's 401K plan, contributing 10 percent of his salary, with Pfizer matching 4.5 percent. (Id. at 17-18.) At the time of his termination, Dotson's contribution was $20,000 and Pfizer's was $10,000. (See id. at 23.) Dotson estimates his lost 401K investment potential for the 15-year period until his retirement to be $2.4 million. (See id. at 23-29.) Finally, Dotson estimated that he would receive 4300 stock options per year until he retired and that the value associated with those lost stock options is $2 million. (Id. at 33-34, 40.)

Two months after the trial, Dotson secured full-time permanent employment. (Pl.'s Reply Defs.' Mem. Opp'n Pl.'s Findings Fact & Conclusions Law, Ex. 2 ¶¶ 2, 3.) In this position, he earns $49,000-$60,000 less per year than what he earned at Pfizer. (Id. ¶ 6.) In addition, his insurance and 401K benefits are $16 000 less than what he received from Pfizer. (See id. ¶ 7.) Dotson is eligible for fewer stock options and is not entitled to an annuity at retirement. (Id. ¶¶ 8, 9.)

Acknowledging that determination of front pay itself is inherently speculative, the court finds that given Dotson's age, education, and experience, it is simply too speculative to make an award of front

pay based on Dotson's stated intent to remain employed at Pfizer until his retirement, or for 15 years. Compare Munoz v. Oceanside Resorts, Inc., 223 F.3d 1340, 1349 (11th Cir. 2000) (concluding district court did not abuse its discretion in awarding ADEA front pay where employee was one year away from retirement at time of trial, had worked for the defendant for 27 years, and was within six years of retirement at time of termination); Kelley v. Airborne Freight Corp., 140 F.3d 335, 355, 356 & n.12 (1st Cir.) (upholding $1,000,000 front pay award under ADEA where the employee had $100,000 salary and "[b]oth experts agreed that, without a college education, it would have been extremely difficult for [the employee] to obtain a comparable salary"), cert. denied, 525 U.S. 932 (1998); Padilla v. Metro-North Commuter R.R., 92 F.3d 117, 125-26 (2nd Cir. 1996) (under ADEA, front pay award covering a period of 20 years affirmed; the plaintiff's salary was $65,800 yet he had limited education and unique, narrowly focused skills such that it was very unlikely the plaintiff would find alternative employment at that salary), cert. denied, 520 U.S. 1274 (1997); Jackson v. City of Cookeville, 31 F.3d 1354, 1358, 1359 (6th Cir. 1994) (jury award of $467,192 in front pay on age discrimination claim upheld where the plaintiff testified he planned to continue to work for eleven years, he was drawing pension benefits which indicated he was not working, and the defendants had failed to show that the plaintiff had not mitigated his damages), with Peyton v. Dimario, 287 F.3d 1121, 1129-30 (D.C. Cir. 2002) (award of front pay for 26 years in Title VII case was unduly speculative where the plaintiff was 34 years old and

not incapacitated, and noting that "'[o]ther courts seem to agree that plaintiffs in their forties are too young for lifetime front pay awards.'" (citation omitted)); Dominic v. Consolidated Edison Co. of NY, Inc., 652 F. Supp. 815, 820 (S.D.N.Y. 1986) (awarding front pay under ADEA for a period of two years to highly educated, 52-year-old plaintiff), aff'd, 822 F.2d 1249 (2nd Cir. 1987). This finding is particularly supported by the fact that Dotson secured similar employment, although perhaps not entirely comparable, shortly after trial.

The court would, however, be inclined to award front pay for a more limited duration, such as three years, had Dotson not been made whole by the jury and liquidated damages awards. Using Dotson's own figures for his lost future earnings, insurance benefits, and 401K benefits (taking into account his current earnings and benefits, (see Pl.'s Reply Defs.' Mem. Opp'n Pl.'s Findings Fact & Conclusions Law, Ex. 2 ¶¶ 6, 7)) for a three-year period, his losses total $228,000.[10] The liquidated damages award alone more than makes up for these losses. And, in fact, the total of the jury's award and the liquidated damages award nearly cover the amount Dotson requested at trial and the amount of future lost earnings for three years. The court finds plaintiff has

[10] ($60,000 lost earnings x 3) + ($16,000 lost benefits x 3) The court did not include in the calculation any amounts for the lost retirement annuity based on the conclusion not to award front pay until retirement nor for the lost stock options because the court was not provided sufficient evidence to make such a valuation.

been made whole, and therefore an award of front pay is not warranted.[11]

D. Attorneys Fees and Costs

A successful FMLA plaintiff is entitled to "a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action." 29 U.S.C. § 2617(a)(3). The award of such fees and costs is mandatory. See McDonnell v. Miller Oil Co., 134 F.3d 638, 640, 641 (4th Cir. 1998) Dotson seeks $550,457.25 in attorneys' fees and $17,552.36 in costs.

Initially, the court must address Pfizer's suggestion that Dotson's fee request "may even 'shock the conscience' of the court," and that under such circumstances, a request may be denied in its entirety. (Resp. Opp'n to Pl.'s Mot. for Liq. D. at 5-6.) It is true that "a request for attorneys' fees, which is so exorbitant as to shock the conscience of the court, may be denied without an analysis of the [requisite] factors [(detailed below)]." Sun Publishing Co. v. Mecklenburg News, Inc., 823 F.2d 818, 819 (4th Cir. 1987). Even assuming the court could exercise its discretion in this manner given the mandatory nature of a FMLA fee award, the court will not do so as the circumstances here are distinguishable from those in Sun Publishing and The Fair Housing Council of Greater Wash. v. Landow, 999 F.2d 92 (4th Cir. 1993), cases on which Pfizer relies. In Sun

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[11] In so concluding, the court need not consider Pfizer's after-acquired defense as a ground for denying front pay, (see Defs.' Mem. Opp'n Pl.'s Findings Fact & Conclusions Law at 2-4).

Publishing, the plaintiff had already been awarded nearly $300,000 in fees and the Fourth Circuit agreed with the district court that the plaintiff's request of an additional $42,000 for time related to "one simple issue" was unreasonable and exorbitant. 823 F.2d at 819-20. Similarly, in Landow, the Fourth Circuit found the denial of a party's fee request in its entirety would be justified on the "shock the conscience" basis because of the party's "woefully inadequate time records" and "its failure to make a good faith effort to exclude fees attributable to unsuccessful claims." 999 F.2d at 97. These cases represent the extreme. This case does not fall within that category. Accordingly, the court will analyze Dotson's fee request in the normal course.

> In calculating an award of attorneys' fees, a district court should "determine[ ] a 'lodestar' figure by multiplying the number of reasonable hours expended times a reasonable rate." In deciding what constitutes a "reasonable" number of hours and rate, the district court generally is guided by the following particular factors: "(1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances;

> (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases."

McDonnell, 134 F.3d at 640 (alterations in original; citations omitted).

Pfizer does not take issue with the hourly rates Dotson's counsel charged. (Resp. Opp'n to Pl.'s Mot. for Liq. D. at 9 n.5.) Based on its knowledge of the prevailing rates charged in this community for this type of work, see Depaoli v. Vacation Sales Assoc., L.L.C., 489 F.3d 615, 622 (4th Cir. 2007); (Pl.'s Mem. Supp. Mot. for Liq. D., Barrett Aff.), the court finds the following hourly rates are reasonable: William P. Barrett, $250-275; Joshua M. Krasner, $200-245; Jonathan R. Bumgarner, $155; Deborah L. Shutt, $85-100; and, Terrence D. Friedman, $220.[12]

Turning to the issue of hours expended, Pfizer requests that the court reduce the hours for which Dotson's counsel may be compensated by 50 percent to account for Pfizer's purportedly successful after-acquired evidence defense. Pfizer is correct that

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[12] Variations in some of the rates are due to the length of time counsel has worked on the matter and to periodic increases in the law firm's standard rates. (Pl.'s Mem. Supp. Mot. for Liq. D., Barrett Aff. ¶ 8.)

> "the most critical factor" in calculating a reasonable fee award "is the degree of success obtained," and when "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." Thus, even when an award of attorneys' fees is mandatory, the district court may decrease the amount of fees that might otherwise be awarded in order to account for the plaintiff's limited success. In accounting for the plaintiff's limited success, a court should examine "the size of the proposed attorney's fee . . .award in comparison with the total damage award."

McDonnell, 134 F.3d at 641 (citations omitted; alterations in original).

At trial, Pfizer did advance the after-acquired evidence defense, and the court instructed the jury accordingly.

> Th[is] . . . doctrine concerns the effect of evidence of employee misconduct acquired by the employer after the employee has been terminated for a discriminatory reason. In McKennon [v. Nashville Banner Publishing Co., 513 U.S. 352, 362-63 (1995)], the Supreme Court held that evidence of employee

> wrongdoing acquired after wrongful termination may limit an award of back pay (and disentitle an employee to front pay and reinstatement) when the employer establishes "that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."

Miller, 250 F.3d at 837. Pfizer argues that the jury's back pay award of $331,429.25 "was in accordance with the after-acquired evidence position advanced by [it]." (Defs.' Mem. Opp'n Pl.'s Findings Fact & Conclusions Law at 3.) Pfizer posits that the jury calculated this amount by dividing the back pay amount Doston requested ($451,949) by the number of months Dotson would have otherwise been entitled to back pay (30) to arrive at a monthly amount of back pay ($15,064.96666) and multiplying that monthly amount by the number of months the after-acquired evidence defense would have limited back pay (22). (Id.) While the resulting number is nearly identical to the jury's back pay award, and thus Pfizer's argument is persuasive, the court will not impose an across-the-board 50 percent reduction in the hours claimed by Doston's counsel, when the court is not certain the jury discounted Doston's back pay request on this basis and the court did not use after acquired evidence as the ground for finding an award of front pay is not appropriate, see supra n.11. Rather, the court will consider, along with other factors, discussed below, that Doston sought $452,000 in back pay, an equal amount in liquidated

damages, and $8,000,000 in front pay, or total damages of $8,904,000,[13] and that he will ultimately be awarded $667,000 in total damages. The amount of the proposed fee award is 83 percent of the amount of total damages. The court agrees with Pfizer that fees should be reduced to account for (1) more than half of the hours claimed being blocked billed; (2) vague billing entries; (3) the inclusion of hours related to a National Labor Relations Board proceeding[14] and to a conflict of interest dispute; and, (4) the inordinate amount of time spent on pre-filing representation and in responding to Pfizer's motion for summary judgment. Additionally, the court considers attorney fee awards in other employment discrimination cases. Examining the cases cited by the parties as well as those cited in 2 Alba Conte, Attorney Fee Awards § 11:16 (3d ed. 2007), awards in excess of $400,000 appear to be reserved for extraordinary, unusual, and/or highly litigious cases. See, e.g., Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir.) (upholding $527,888 fee award in highly controversial Title VII case involving transsexual police officer, six-year litigation, $320,511 compensatory damages, 1.75 multiplier applied to lodestar due to novelty, difficulty, immense skill required, and extraordinary result), cert. denied, 546 U.S. 1003 (2005); Gonzalez v. Bratton, 147 F. Supp. 2d 180 (S.D.N.Y. 2001)

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[13] The court does not independently recall the exact amount of damages Doston requested the jury award him on his interference claim. The court does recall the amount was minimal when compared to the amount of back pay sought on the retaliation claim.

[14] Dotson concedes that these hours should not be included in any fee award. (Pl.'s Reply at 6 n.4.)

(multidefendant Title VII case, three-week trial, $1.25 million compensatory damages, $110,000 punitive damages, $867,809 attorneys fees for work of Manhattan lawyers), aff'd, 48 Fed. Appx. 363 (2nd Cir. 2002); Blakely v. Continental Airlines, Inc., 2 F. Supp. 2d 598 (D.N.J. 1998) (Title VII, five-year litigation, five-week trial, $625,000 amended judgment, $764,650 attorney's fees). Taking into consideration these factors and the fact that Doston did not obtain all the relief he requested, the court finds that an attorneys fee award of $375,000 is reasonable.[15]

As for costs, on 15 February 2007, the Clerk awarded Dotson $11,429.46. On 22 February 2007, Pfizer filed a motion requesting that the court review this order because at that time a final, appealable judgment had not been entered. Given the court's ruling herein, the Clerk's order stands and Pfizer's motion for review of that order will be denied.

III. CONCLUSION

For the foregoing reasons, Pfizer's motion for judgment as matter of law or, alternatively, for a

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[15] As noted previously, Pfizer does not take issue with the hourly rates of Dotson's counsel, and because of the length of time of representation, the rates of the two attorneys who billed the most hours on the case, Barrett and Krasner, changed three times. As such, to reduce the hours to account for the specific factors noted and determine the rates charged for those hours, the court would be required to parse through hundreds of billing entries. The court arrived at the $375,000 figure by estimating what the lodestar figure would be based on the underlying rates and reasonable hours. The figure amounts to roughly a 32 percent reduction in fees requested.

new trial is DENIED. Dotson's motion for liquidated damages and attorneys fees is ALLOWED. Pfizer's motion for review of the Clerk's order taxing costs is DENIED. Dotson is not entitled to front pay. Dotson's motion to strike all references to his 5 May 2006 deposition contained in Pfizer's memorandum opposing front pay is DENIED as moot because the court did not consider those references in making its front pay ruling. Pfizer's motion for leave to file a surreply to Dotson's reply to Pfizer's memorandum opposing front pay is DENIED. Pfizer's motion to reopen the front pay hearing is DENIED as moot. Pfizer's motion for review of the Clerk's order taxing costs is DENIED.

It is hereby ORDERED, ADJUDGED, and DECREED that Dotson have and recover of Pfizer:

1. $333,305.25 in liquidated damages; and

2. $375,000 in attorneys fees.

This 29 August 2007.

W. Earl Britt

Senior U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:04-CV-722-BR(3)

JAMES D. DOTSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
PFIZER, INC.,	)	
	)	
Defendant.	)	

Defendant's motion for summary judgment is before the court.

Plaintiff James D. Dotson filed this action against Pfizer, Inc. (Pfizer) on 30 September 2004 alleging various violations of the Family Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601-2654. On 8 November 2004, defendant filed an answer, and, after receiving permission to do so, filed an amended answer on 18 October 2005. Defendant filed this motion for summary judgment and a supporting memorandum on 8 November 2005. On 9 December 2005, plaintiff filed a response accompanied by affidavits and exhibits and a statement of material facts. Defendant filed a reply on 27 December 2005. The motion is ripe for review.

Facts

Dotson began working for Pfizer, a pharmaceutical company, as a Professional Healthcare representative (PHR) in 1988. Over the next fifteen years, Dotson served as an Institutional Healthcare Representative (IHR),[1] as an assistant to the regional manager for the Mid-Atlantic region, as a district sales manager, as the Director of Management Training and Development, as a regional sales manager with the Steere division dealing with Viagra, Zithromax, Lipitor and Norvasc, as an Institutional Healthcare Account Manager (IHAM) within Pfizer's National Healthcare Organization (NHO) (a pilot position) beginning in Spring 2002, and finally as a Regional Account Manager (RAM) within NHO beginning in June 2003. (Dotson Dep. at 9-24.)

In his capacity as an IHAM between 1 June 2002 and May or June of 2003, Dotson reported to John Lalley, NHO's Area Manager for the Mid-Atlantic Region, (Dotson Dep. at 23), and he coordinated Pfizer's marketing efforts at major teaching hospitals, including the UNC Health System, Johns Hopkins, Thomas Jefferson Health Systems (Philadelphia, Pennsylvania), and the University of Pennsylvania, (id. at 81-82). As a RAM, beginning in June 2003, following Pfizer's

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[1] PHRs typically call on individual doctors and practice groups, while IHRs focus their efforts on the staffs of major teaching hospitals and military accounts. These sales representatives report to a district manager, who is supervised by a regional manager. The regional managers report to the vice president of sales in charge of their particular regions. (Hodges Aff. ¶ 2.)

acquisition of Pharmacia and structural reorganization, (Dotson Dep. at 113-15), Dotson was supervised by Managed Market Manager (MMM) Chris Kennedy, who, in turn, reported to Area Manager Patrick McElerney, (McElerney Dep. at 6). In this new role, Dotson was primarily responsible for calling upon local affiliates of national managed care customers and other local managed care companies. (Wilbanks Dep. at 10-11; McElerney Dep. at 44-45.) Dotson continued some of his IHAM projects after beginning work as a RAM.[2]. (Dotson Dep. At 126-27; Kennedy Dep. at 39-40.)

While he was working as an IHAM, in February 2003, Dotson and his wife began pursuing the adoption of a baby girl from Russia. Dotson informed Pfizer of his plan that month and kept Pfizer apprised of his progress in that regard. (Dotson Dep. at 282-86 & Exs. 28, 52, 72A; Kennedy Dep. at 157-58, 208-09, 230.) Shortly after Dotson began working as a RAM and Kennedy began working in Raleigh in June 2003, Dotson informed Kennedy of his plans. (Kennedy Dep. at 161-62.) Dotson's employment as a RAM was terminated on or about 11 November 2003, approximately two and

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[2] Kennedy, a former Pharmacia employee with no managerial experience, (Kennedy Dep. at 8; McElerney Dep. at 27), made clear in his deposition that he was not familiar with Dotson's work or his responsibilities as an IHAM and that Kennedy did not know the extent to which there was any overlap between the responsibilities of the IHAM and RAM positions. (Kennedy Dep. at 30-33.) Kennedy and McElerney both stressed in their depositions, however, that Dotson had a difficult time with his transition to the RAM responsibilities between May and November 2003. (McElerney Dep. at 49; Kennedy Dep. at 41-44.)

a half weeks after he and his wife returned from Russia with their adopted child. Pfizer informed Dotson at that time that he was being fired based on his violations of Pfizer's policies pertaining to "starters," samples of Pfizer's products produced and distributed to promote and sell Pfizer's pharmaceuticals. In order to comply with federal law, in particular the Prescription Drug Marketing Act of 1987 (PDMA), 21 U.S.C. §§ 353, et seq., Pfizer is required to track starters from the time they leave a manufacturing facility until they are placed with a licensed health care professional. Applicable federal regulations and Pfizer's various policies pertaining to the handling and distribution of starters are explained in Pfizer's Starter Guide. (Batura Dep. at 181-82; Dotson Dep., Ex. 3.) Before he accepted the position as an IHAM within NHO, Dotson handled starters and supervised employees who handled starters for approximately 13 years in the course of his work for Pfizer. Pfizer has not raised any objections to Dotson's use of starters prior to his tenure with NHO. The basis for termination offered by Pfizer in this case arises from Dotson's request for, receipt and possession of, and distribution of starters on two separate occasions during his tenure with NHO as a RAM, in the summer and fall of 2003.

Dotson obtained approximately six cases of Celebrex from IHR Ashley Holstrom (now Stalker) on 28 August 2003 for the purpose of conveying those drugs to Dr. Tom Griggs, the Medical Director of the North Carolina Highway Patrol. (Dotson Dep. at 131-32, 143-47, 167.) Stalker and Dotson completed the required starter forms recording the transfer to Dotson. (Jd. At 142-43 & Ex. 4.) Stalker

was not aware that the transfer would violate any policy and, because NHO was part of sales, she did not know that NHO personnel could not receive starters.[3] (Stalker Dep. at 20-21, 31.) Dotson was also unaware that his procurement and delivery of starters to Dr. Griggs would violate any Pfizer policy. (Dotson Dep. at 213, 416 & Ex. 81.)

On 4 September 2003, Dotson obtained a case of short-dated Zithromax oral suspension from IHR Bridgit Jones, with the intent of taking that medicine overseas to donate to the orphanage in Russia where he and his wife were attempting to adopt a child. (Dotson Dep. 169-70, 173, 180, & Ex. 17; Jones Dep. 17-18, 20.) At the time of transfer, Jones informed Dotson that her supervisor, Al Gilmore, had told her that the transfer was fine but that they should be sure to enter the transactions in time for inventory the following day. (Dotson Dep. at 176.) Accordingly, Jones entered the transaction into the starter tracking software on her personal computer on that date. (Jones Dep. at 27; Dotson Dep. at 174.) Dotson also attempted to enter the Zithromax transaction into his computer on 4 September 2003 and was unable to do so. (Dotson Dep. at 175, 219.) At that time, he called the Pfizer help desk and was told that "in [his] position, [he did] not have the capacity to record a sample transaction." (Id. at 177, 219.) Dotson then assumed that the transfers of Celebrex and Zithromax would have to be entered manually. (Id. at 177-78.)

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[3] Unlike the general sales representatives, employees of the NHO, which is also a sales arm of Pfizer, do not typically call on primary care physicians. (Wilbanks Dep. at 30-31.)

According to Dotson, he mentioned the Zithromax transfer to Kennedy on 4 September 2003, the date the transaction took place, and Kennedy said nothing. (Id. at 178.) Dotson testified that he also informed Kennedy by telephone on September 5 that Kennedy would need to do a manual entry of the transaction and that they could discuss it further at their meeting on September 11. (Id. at 179-82.) At that time, Kennedy did not respond. (Id. at 179.) On or about 8 September 2003, Dotson informed Kennedy and several colleagues of his plan to take Zithromax to Russia at a health care cluster meeting on or about 8 September 2003. (Id. at 182-83; Gouveia-Pisano Dep. at 67-70.) According to Dotson, at the September 8 meeting, Kennedy said nothing at all in response to his statement that he planned to take Zithromax to Russia. Moreover, Kennedy did not inform Dotson that he should not have starters in his possession or that he should not take starters to Russia. (Dotson Dep. at 186-87; Kearney Dep. at 53-55; Gouveia-Pisano Dep. at 67-70.). Dotson met Kennedy at Southpoint Mall on 11 September 2003 and, during the course of a meeting about Dotson's business plan, told Kennedy that the Zithromax transfer needed to be entered manually and how to perform a manual entry. (Dotson Dep. at 181-82, 184.) Kennedy confirms that he knew by September 11 that Dotson planned to take Zithromax to Russia, but also states that he told Dotson at that time that Dotson was not authorized to have starters. (Kennedy Dep. at 230.) Dotson has testified, however, that, between 11 September 2003 and 21 September 2003 when he left for Russia, Kennedy never advised Dotson that he was not permitted to receive or handle starters, never

instructed Dotson to return the Zithromax starters, (Dotson Dep. at 185-86; Kennedy Dep. at 215-16, 218), and never reported Dotson's allegedly improper receipt of starters to Pfizer's "Sample Compliance," (Kennedy Dep. at 217, 219), to Area Manager McElerney (his supervisor), or to Human Resources, (Kennedy Dep. at 215-19, 279). Meanwhile, on or about 9 September 2003, after some colleagues suggested he take some leave and before he left for his first trip to Russia, (Dotson Dep. at 366), Dotson contacted Amy Burnell, a Human Resources representative, to ask about his leave options. (Dotson Dep. at 365-68 & Ex. 49.) According to Burnell, she advised Dotson accordingly and informed him of the right to take FMLA leave. (Burnell Aff. ¶ 3.) Burnell also asserts that she advised Dotson to contact the Human Resources representative for the Southeast Regional office. Dotson testified, however, that when he asked how the FMLA process would work, "she indicated that I used my vacation time, and then after vacation is over, then FMLA would kick in." (Dotson Dep. at 365-66.) Dotson was not told that his vacation would count against his FMLA leave. (Id.) Dotson had carried over a significant amount of vacation from 2002, and he believed that those vacation days would cover the days he was absent from work in connection with the adoption. (Id. at 366-67; McElerney Dep. at 38.) Ultimately, because he believed his adoption-related absences would not exceed his remaining vacation time, and because he believed FMLA would not apply until his paid leave was exhausted, Dotson did not formally request FMLA leave. (Dotson Dep. at 234-35, 238.)

On 19 September 2003, just before he went to Russia, Dotson delivered the Celebrex he had obtained from Stalker to Dr. Tom Griggs, the Medical Director of the North Carolina Highway Patrol. (Batura Dep., Ex. 162; Dotson Dep. 151, 154, 188-90.) At some point between 21 September 2003 and 27 September 2003, during his first trip to Russia, Dotson delivered the Zithromax that he had obtained from Jones to a person whom Dotson believed to be a pediatrician with the orphanage. Dotson did not obtain a signed receipt from that individual. (Dotson Dep. at 200, 206.)[4]

When he returned from his first trip to Russia, Dotson met with Kennedy and McElerney, Kennedy's supervisor, for his semi-annual review on 7 October 2003. (Id. at 210.) They discussed Dotson's receipt and disposition of the starters obtained from Stalker and Jones. Dotson learned at that meeting that NHO employees were not allowed to have starters, and Dotson informed Kennedy and McElerney that he had been unaware that it was against Pfizer policy for NHO employees to have starters. (Id. at 213, 416.) On 8 October 2003, Dotson called Pfizer's Office of Starter Compliance. (Id. at 242-43.) Jim Batura, associated with Starter Compliance, spoke with Dotson and began an

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[4] According to Dotson, he obtained a signature from the pediatrician he and his wife had selected to review his daughter's medical records, a Dr. Rusher, but that he lost that signed form. After returning from his first trip to Russia and after being notified at his semi-annual review that his handling of the starters was problematic, Dotson had Dr. Rusher's partner, a Dr. Foster, sign a second form for the starters on or about 9 October 2003. (Dotson Dep.at 192-94, 224.)

investigation on that date of Dotson's use of starters. (Id. at 215.)

Discussion of Dotson's conduct regarding the starters ensued among Dotson's superiors, including Kennedy, McElerney, and Vice President Steve Harper. Kennedy was not involved, however, in the upper-management discussions pertaining to the appropriate response to Dotson's handling of starters. (Kennedy Dep. at 350, 353.) While Kennedy and McElerney allegedly recommended that Dotson be placed on a performance improvement plan, (McElerney Dep. at 33), Harper recommended that Dotson be terminated, and McElerney and Hodges ultimately agreed with that recommendation, (McElerney Dep. at 227-29, Hodges Dep. at 21), which was then presented to Kristi Keinzle, a director in Pfizer's Human Resources group in New York, and the Senior Vice President of the Healthcare Cluster, Carl Wilbanks, (Wilbanks Dep. at 8-9). Wilbanks agreed with the recommendation because of the "very serious" nature of Dotson's conduct, which placed Pfizer at risk, and because, in his opinion, an employee with Dotson's experience "should [have known] better." (Wilbanks Dep. at 27, 47-48, 66.)

In the midst of these discussions, Dotson and his wife returned to Russia from 13 October 2003 through 25 October 2003 to complete the adoption process. They were able to bring their adopted daughter home with them at the end of that visit. The Dotsons had agreed, at the outset, to accept a child with serious health problems. The child they eventually adopted had suffered chronic respiratory

infections and was ill when they were allowed to bring her home. Within five days of returning to work, Dotson asked Kennedy to excuse him from a work-related out-of-town dinner Kennedy had asked him to attend, based on the continued serious illness of his newly adopted daughter. (Kennedy Dep. at 156-59; Ex. 78.) Kennedy refused and required Dotson to attend. (Id. at 159.)

Dotson was terminated on or about 11 November 2003. Pfizer told him that his employment was being terminated because of his violations of Pfizer's starter policy. Dotson has alleged that Pfizer did not allow him the protection of the FMLA for his absences from work related to the adoption of his daughter, (Compl. ¶¶ 30-31, 41), that Pfizer interfered with his attempts to take leave to adopt his daughter in several ways, (Compl. ¶¶ 32-33), and that his termination was unlawfully premised on his decision to take time off of work to facilitate the adoption process, and his subsequent request to be released from a particular work obligation that involved traveling in order to care for his sick child, all in violation of the FMLA (Compl. ¶¶ 35-39, 42).

Summary Judgment

Summary judgment is appropriate in those cases in which there is no genuine dispute as to a material fact, and in which it appears that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Haavistola v. Community Fire Co. of Rising Sun, Inc., F.3d 211, 214 (4th Cir. 1993). Summary judgment should be granted in those cases "in which it is perfectly clear that no

genuine issue of material fact remains unresolved and inquiry into the facts is unnecessary to clarify the application of the law." Id. In making this determination, the court draws all permissible inferences from the underlying facts in the light most favorable to the party opposing the motion. "[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." Teamsters Joint Council No. 83 v. Centra, Inc., 947 F.2d 115, 119 (4th Cir. 1991).

III. Discussion

Under the FMLA, an eligible employee is entitled to a total of 12 workweeks of leave during any 12-month period "because of the placement of a [child] with the employee for adoption . . . ." See 29 U.S.C. § 2612(a)(1)(B). An employee may elect, "or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided [for purposes of adopting a child] for any part of the 12-week period of such leave . . . ." 29 U.S.C. § 2612(d)(2)(A). Upon return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced or to an equivalent position. 29 C.F.R. § 825.214(a). Sections 2615(a)(1) and (2) prohibit an employer from interfering with these substantive entitlements provided by the FMLA and from discriminating against an employee for exercising or attempting to exercise such rights.

As the Eleventh Circuit explained in Strickland v. Water Works & Sewer Board of City of Birmingham, 239 F.3d 1199, 1206 (11th Cir. 2001), the

> FMLA creates two types of claims: interference claims, in which an employee asserts that his employer denied or otherwise interfered with his substantive rights under the Act, see 29 U.S.C. § 2615(a)(1), and retaliation claims, in which an employee asserts that his employer discriminated against him because he engaged in activity protected by the Act, see 29 U.S.C. § 2615(a)(1) & (2); 29 C.F.R. § 825.220(c) . . . .

Various courts have analyzed the differences between these types of claims and have elaborated upon the different frameworks to be used in addressing such claims.

> Based on the mandatory language of the FMLA and its legislative history, the court [in Williams v. Shenango, 986 F. Supp. 309 (W.D. Pa. 1997)] reasoned that interference claims should be governed by a strict liability standard. Williams, 986 F. Supp. at 317- 18 (citing Kaylor v. Fannin Regional Hosp., Inc., 946 F. Supp. 988, 996-97 (N.D. Ga.1996)); see also Cross v. Southwest Recreational Industries, Inc., 17 F.Supp.2d 1362, 1369 (N.D. Ga.1998). Under this strict liability

> standard, an employer's intent is relevant in interference claims only with regard to the issue of damages as set forth in 29 U.S.C.A. § 2617(a)(1)(A)(iii) (West 1999). Williams, 986 F. Supp. at 318 (quoting Kaylor, 946 F. Supp. at 997).. . .
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> . . . Unlike with interference claims, the analytical framework to be used in FMLA retaliation cases appears to be widely established. It appears that every court that has addressed the issue has applied the shifting burdens of proof analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, . . .(1973), to assess FMLA retaliatory discharge claims. Blankenship v. Buchanan General Hospital, 140 F. Supp. 2d 668, 673 (W.D. Va. 2001) (collecting cases).[5]

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[5] In Walthall v. Fulton County School Dist., 18 F. Supp. 2d 1378, 1382 (N.D. Ga. 1998), aff'd, 192 F.3d 131 (11th Cir. 1999), the court characterized both interference claims and retaliation claims as claims based on the proscriptive entitlements of the FMLA. The Walthall court went on to explain that the "question of the employer's intent becomes relevant in determining whether the employer has taken adverse action against the employee for exercising an FMLA right," creating some ambiguity as to whether intent is required for an interference claim from that court's perspective.

The Strickland court, on the other hand, characterizes the interference claim as a violation of a prescriptive entitlement setting forth substantive rights under the Act and clearly states that the employer's intent is not pertinent. Strickland, 239 F.3d at 1206-07. Other courts appear to agree

The regulations pertaining to interference provide that "[a]ny violations of the [FMLA] or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the [FMLA]. 'Interfering with' the exercise of an employee's rights would include, for example, "not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA . . . ." 29 C.F.R. § 825.220(b). With respect to retaliation, it is unlawful for "any employer to discharge or in any other manner discriminate against any individual for opposing any practice

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with the Strickland approach to the relevance of employer intent. See, e.g., Blizzard v. Exel Logistics North America Inc., No. Civ.A-02-4722FLW, 2005 WL 3078175, *16 (D.N.J. Nov. 15, 2005) ("One theory of recovery under the FMLA is the entitlement, or interference, theory. It is based on the prescriptive sections of the FMLA which create substantive rights for eligible employees."); Peters v. Community Action Committee, Inc., 977 F. Supp. 1428, 1432-33 (M.D. Ala. 1997) (recognizing prohibition of interference with entitlements as a proscriptive protection, but acknowledging that employer's intent is irrelevant if the sole question presented is whether an employee has received her entitlements under the FMLA). See generally, Colburn v. Parker Hannifin/Nichols Portland Div., 429 F.3d 325, 331-32 (1st Cir. 2005) (discussing courts' disagreement "about whether 'interference' refers to a category of claims separate and distinct from those involving retaliation, or whether it describes a group of unlawful actions, of which retaliation is a part" and explaining that "whether a claim is characterized as 'interference' or not, its elements actually differ depending on whether the plaintiff is, at bottom, claiming that the employer denied his or her substantive rights under the FMLA or that the employer retaliated against him or her for having exercised or attempting to exercise those rights.").

made unlawful" by the FMLA. See 29 U.S.C. § 2615(a)(2). Dotson has alleged both an interference claim and a retaliation claim. As an initial matter, however, the court will address Pfizer's claim that Dotson's absences were not covered by the FMLA in any event because they were intermittent.

A. Intermittent Absences

Pfizer contends that Dotson's intermittent adoption-related absences prior to the actual adoption were not covered by the FMLA, and that Dotson's complaint should be dismissed on that basis. Section 2612 provides that "[l]eave [taken because of placement of a child with the employee for adoption] shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise." 29 U.S.C. § 2612(b)(1). See also Harrison v. Bush Hog Division of Allied Products Corp., 2000 WL 726910, *13 (S.D. Ala. May 22, 2000) ("For the birth, adoption or foster care of a child, the company and the employee must mutually agree to the schedule before the employee may take the leave intermittently or work a reduced hour schedule."). The applicable regulation provides:

> (b) When leave is taken *after the birth or placement of a child for adoption* or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees. Such a hedule reduction might occur, for example, where an employee with the employer's agreement, works part-

> time after the birth of a child, or takes leave in several segments.

29 C.F.R. § 825.203(b) (emphasis added). While Pfizer has cited the correct rule for absences taken after the adoption of a child, the regulations clearly anticipate the taking of intermittent leave to facilitate an adoption before the adoption actually takes place:

> (d) Employers covered by FMLA *are required* to grant FMLA leave pursuant to paragraph (a)(2) of this section *before the actual placement or adoption of a child* if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, or submit to a physical examination. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

29 C.F.R. § 825.112(d) (emphasis added).[6] The leave contemplated in § 825.112(d), by definition intermittent, is not of the type that requires an agreement between the employer and employee in that the regulation requires an employer to grant such leave if it is necessary to effectuate the adoption.

Even if intermittent FMLA leave before the actual placement of a child for adoption required an agreement between the employer and employee, the court could not dismiss plaintiff's claim on this basis at this point in the proceedings. Under the applicable regulations, the employer and employee

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[6] Pfizer suggests that the "alleged intermittent nature of the examples is not inconsistent with an interpretation of the regulation as simply allowing the one period of continuous adoption-related leave authorized by the statute to begin before placement of the child." (Reply Br. at 3.) That analysis is unsound when considered in the context of a typical adoption procedure. A counseling session, a homestudy by an adoption agency, or a meeting with a lawyer or doctor may precede the actual adoption of a child by weeks, if not months. It would be entirely illogical to conclude that an employee attempting to adopt would assert FMLA-covered leave to initiate a homestudy and then take twelve weeks of leave following the initiation of that homestudy regardless of the fact that the child has not been placed and the employee is not engaged in any further adoption related activities during that time. See, e.g., www.wacap.org/International-russia.asp (Website for World Association for Children & Parents explaining that a homestudy by a state-licensed agency necessarily precedes an adoption and that the homestudy process itself takes approximately four to six weeks in most states, that the necessary documents take approximately six to twelve weeks to process, and that the adoption cannot take place until both the homestudy and paperwork have been finalized).

can agree on a schedule of intermittent leave. If, as Dotson claims, Pfizer told him he was not eligible for FMLA leave because he still had paid leave available, he clearly never had the opportunity to discuss the possibility of an intermittent leave schedule. The court cannot conclude that Dotson's leave was not covered by the FMLA on this basis.

B. Interference

Dotson claims that he notified his employer of his need to take leave to enable an adoption, i.e., an FMLA-protected activity, and that he specifically asked about FMLA leave and was told it was not available to him because he had paid leave remaining.[7] (Dotson Dep. at 367.) Dotson did not

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[7] In accordance with federal law, Pfizer has an FMLA policy permitting employees to take 12 weeks of unpaid, job-protected leave in the event that, among other reasons, an employee adopts a child. According to Pfizer's Human Resources representative Amy Burnell, if an employee who is taking leave for one of the events covered by the FMLA has any accrued vacation or leave time, the employee's leave is counted as vacation time until that vacation time is exhausted and that period of time is then deducted from, or counted against, the maximum available FMLA leave period of 12 weeks. For example, an employee with two weeks of accrued vacation time at the time he or she takes leave following the birth of a child would be entitled to a total of two weeks paid leave and ten weeks unpaid leave.

While this may be an accurate representation of Pfizer's policy, Dotson has testified that he was told FMLA leave was not available to him until he exhausted his paid leave. If Pfizer told Dotson he was not entitled to take FMLA leave, such a statement would constitute an interference with his substantive rights.

formally apply for FMLA leave based on Burnell's statement to him regarding the use of paid leave. (Id. at 366.) Assuming the truth of Dotson's testimony, such facts constitute a claim of interference with Dotson's substantive rights under the FMLA. As the court explained in Strickland, "[t]o state a claim of interference with a substantive right, an employee need only demonstrate by a preponderance of the evidence that he was entitled to the benefit denied." 239 F.2d at 1206-07.[8]

> She does not need to show that the employer treated other employees more or less favorably and the employer cannot justify its action by showing that it did not intend it or it had a legitimate business reason for it. . . . The action is not about discrimination; it is about whether the employer provided its employees the entitlements guaranteed by the FMLA.

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[8] Other courts have set out more detailed tests for interference claims: To succeed on a cause of action for the denial of, or interference with benefits under the FMLA, a plaintiff must establish that: (1) he is an eligible employee under the FMLA; (2) the Defendant is an employer under the FMLA, as defined in 29 U.S.C. § 2611(4); (3) he was entitled to take leave under the FMLA, as defined in 29 U.S.C. § 2612(a)(1); (4) he gave notice to the defendant of his intention to take leave, as defined in 29 U.S.C. § 2612(e)(1) and 29 C.F.R. § 825.302-.303; and (5) that he was denied benefits to which he was entitled under the FMLA.

Moore v. Potter, 353 F. Supp. 2d 410, 414 (E.D.N.Y. 2005).

Parker v. Hahnemann University Hospital, 234 F. Supp. 2d 478, 485 (D.N.J. 2002). Thus, to the extent plaintiff has claimed that he was entitled to FMLA leave and that Pfizer told him he was not eligible for FMLA leave and treated his leave instead as non-FMLA-qualifying paid vacation, Dotson has stated a claim for interference.

Dotson has also provided other instances of behavior by his supervisor that he believes interfered with his right to take FMLA leave. First, Kennedy's consistent treatment of his absences as "vacation,"[9] despite the fact that he knew Dotson was taking time off to adopt a child, an FMLA-protected activity, and Kennedy's insistence on holding Dotson responsible for all work-related deadlines regardless of his leave interfered with his ability to take that leave. See Blohm v. Dillard's, Inc., 95 F. Supp. 2d 473, 481 (E.D.N.C. 2000) (plaintiff's failure to complete certain job requirements was "obviously and inextricably tied to his decision to take leave following the birth of his baby, a decision that the FMLA permits him to

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[9] Pfizer's repeated references to Dotson's alleged "decision to use an unprotected form of leave such as vacation time," (Reply Br. at 5), are simply not persuasive when the court must, for purposes of this motion, accept Dotson's contention that he took paid leave because he believed that was his only option based on his conversation with Burnell. Moreover, even if Pfizer is permitted to require its employees to use paid leave and count that paid leave against (or subtract it from) the FMLA leave to which that employee is entitled, the time during which the employee is getting paid is not "unprotected." Employees on leave for FMLA-protected reasons are protected for the duration of the leave regardless of whether they are being paid.

make"). After finalizing the adoption, Dotson sent an email to Kennedy dated Saturday, 4 October 2003, to share the news and inform him of a potential delay in returning to America. (Dotson Dep, Ex. 74.) Kennedy's email to Dotson dated 23 October 2003, expresses irritation toward Dotson's travel delays, reminds him that all time off requests have to be cleared through Kennedy, and informs him that he is expected back, in any event, for a meeting beginning on 3 November 2003. (Id.) In other email communications transmitted to Dotson while he was in Russia, Kennedy instructed Dotson that various tasks had to be completed while he was gone. (Id., Ex. 75.) See, e.g., Xin Liu v. Amway Corp., 347 F.3d 1125, 1135 (9th Cir. 2003) (mischaracterization of FMLA-qualifying leave as personal leave can qualify as interference because designating leave as personal subjects employee to control and discretion of supervisor in taking leave that employee has a statutory right to take). In addition, when Dotson asked to be excused from a work-related dinner engagement that required him to travel, he specifically asked to be released from that obligation to care for his new daughter who remained seriously ill, but his request was denied. Dotson asserts that the denial of that request also interfered with his rights under the FMLA. Defendant's motion for summary judgment pertaining to Pfizer's alleged interference with Dotson's FMLA rights will be denied.

C. Retaliation

Dotson has also alleged that his employment was terminated in retaliation for his taking leave to

adopt a child. The Strickland court explained that, "to succeed on a retaliation claim, an employee must demonstrate that his employer intentionally discriminated against him in the form of an adverse employment action for having exercised an FMLA right." 239 F.3d at 1207.

A plaintiff may establish a claim of retaliation under the FMLA by providing direct evidence of an employer's intent to discriminate or by indirect evidence in accordance with the burden-shifting framework set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-806 (1973). Here, Dotson has not offered direct evidence of an intent to discriminate. When a plaintiff relies on indirect evidence, the plaintiff must first offer evidence sufficient to establish a prima facie case of discriminatory retaliation. To establish a prima facie case of retaliation under the FMLA, plaintiff must show that he engaged in FMLA-protected activity, that he suffered an adverse employment action, and that a causal link exists between the two. See Cline v. Wal-Mart Stores, Inc., 144 F.3d 294, 301 (4th Cir. 1998). "If an FMLA plaintiff puts forth sufficient evidence to establish a prima facie case of retaliation and the employer offers a nondiscriminatory explanation for the plaintiff's termination, the plaintiff bears the burden of establishing that the employer's proffered explanation is pretext for FMLA retaliation." Nichols v. Ashland Hospital Corp., 251 F.3d 496, 502 (4th Cir. 2001). Plaintiff has provided indirect evidence of discrimination.

1. Prima Facie Case

Dotson participated in a process designed to allow him to adopt a child and then adopted a child from Russia. He took leave from work on at least two occasions to travel to Russia to accomplish that adoption. As explained above, taking leave to facilitate the placement of a child for adoption is an FMLA-protected activity. Dotson was subsequently discharged from his position by Pfizer, two weeks after returning from his trip to Russia and within a few days of requesting to be released from an out of town job obligation due to the illness of his adopted child. Because Pfizer clearly knew that Dotson was attempting to adopt a child, and that he was taking leave to do so, (Kennedy Dep. at 231), the temporal proximity of the events in question gives rise to an inference of causality for purposes of plaintiff's prima facie case. See Badgett v. Federal Express Corp., 378 F. Supp. 2d 613, 627 ((M.D.N.C. 2005) (in the Title VII context, "[t]he Fourth Circuit has held the decisionmaker's knowledge of the protected activity and the timing of the adverse employment action are two factors helpful in determining causation. See Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989)."); Blankenship, 140 F.Supp. 2d at 674 ("the employee may show a causal connection by showing a 'close temporal proximity' between the exercise of a protected right and a subsequent, adverse employment decision.").[10]

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[10] The Strickland court wrote that proximity in time between two events, in that case nine days, though sufficient to raise an inference of causation in some circumstances, was insufficient where unrebutted evidence demonstrated that the decision-maker did not have knowledge that the employee had engaged

a. Protected Activity

Pfizer argues that Dotson's failure to formally request leave under the FMLA or otherwise put Pfizer on notice[11] that he was invoking his rights under the FMLA causes his claim to fail, however. (Def.'s Mem. at 21.) Pfizer appears to be arguing that Dotson's failure to follow formal procedures to take FMLA leave means that Dotson was not engaging in protected activity under the FMLA. Dotson's failure to formally request FMLA leave is simply not dispositive.

Under the relevant FMLA regulations, an employee

> shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. *The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that the*

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or was attempting to engage in protected conduct. 239 F.3d at 1207. In this case, the evidence pertaining to the employer's knowledge is certainly not unrebutted, as the court will discuss further below..

[11] Pursuant to 29 U.S.C. § 2612(e)(1), an employee "shall provide the employer with not less than 30 days' notice, before the date the leave is to begin" if the need for the leave is foreseeable based on an expected placement. If the date of the placement requires leave to begin in less than 30 days, "the employee shall provide such notice as is practicable." Id.; see also 29 C.F.R. § 825.302(a).

> *leave is needed for an expected . . . adoption, for example. The employer should inquire further about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken.*

29 C.F.R. § 825.302(c)(emphasis added). See also Bachelder v. American West Airlines, Inc., 259 F.3d 1112, 1130 (9th Cir. 2001) ("Employees need only notify their employers that they will be absent under circumstances which indicate that the FMLA might apply. . . . the employer is responsible, having been notified of the reason for an employee's absence, for being aware that the absence may qualify for FMLA protection."); Thorson v. Gemini, Inc., 205 F.3d 370, 381 (8th Cir.) (employee need not invoke FMLA by name, rather employer's duties are triggered when employee provides enough information to put employer on notice that employee may need FMLA leave), cert. denied, 531 U.S. 871 (2000); Robinson v. Overnite Transportation Co., No. 95-3067, 1997 WL 165416, *7 (4th Cir. April 9, 1997)("Although an employee must provide his employer with notice of his need for FMLA leave, he is not required to expressly mention the FMLA. . . . Rather, it is sufficient for the employee to notify his employer that 'leave is needed for an expected birth or adoption, for example.' 29 C.F.R. § 825.302(c) (1993)."); Dillon v. Maryland-National Capital Park and Planning Comm'n, 382 F.Supp.2d 777, 788 (D. Md. 2005) (""The critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for [an FMLA-qualifying need.]' Manuel

v. Westlake Polymers Corp., 66 F.3d 758, 764 (5th Cir.1995) . . . ."); Carpenter v. Refrigeration Sales Corp., 49 F. Supp. 2d 1028, 1030 (N.D. Ohio 1999) (employee need not expressly invoke FMLA rights, but need only request leave for one of the qualifying reasons contained in § 2612); Peters, 977 F. Supp. at 1436 (rejecting argument that plaintiff was not entitled to the protections of the FMLA because she did not notify her employer "that she was taking leave *pursuant to the FMLA*" and explaining that "simply because [plaintiff] did not inform anyone that she was taking leave pursuant to the FMLA does not affect her being protected by the statute, so long as she gave notice of her daughter's serious health condition for which she was taking leave")(emphasis original).) Dotson engaged in protected activity when he traveled to Russia and engaged in other activities to facilitate his adoption of a child, and his employer was aware of his activities.

Moreover, the facts construed in the light most favorable to Dotson emphasize the protected nature of his activity. Not only did Dotson notify his employer that he would need to take some leave to accomplish the adoption, he specifically asked Human Resources about FMLA leave. He emerged from his conversation with Human Resources believing that he would not be permitted to take FMLA leave until he used up any available paid vacation time.[12]

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[12] This case is distinguishable from Strickland, a case in which the court found that no evidence supported the plaintiff's contention that he notified his employer of his need to take leave for an FMLA-qualifying reason or that he needed FMLA

b. Causality

In an apparent attempt to demonstrate that Dotson has failed to establish a causal connection between his protected activity and Pfizer's adverse action against him, Pfizer argues that, because it did not know that Dotson was pursuing FMLA leave for his adoption related absences, it cannot be held liable for allegedly "interfer[ing] with his exercise of rights under the FMLA by discharging him several weeks after he returned from a paid vacation during which he traveled to Russia to adopt a child." (Def.'s Mem. at 17.) Pfizer argues that, to establish a claim of retaliation, a plaintiff must demonstrate that the employer had notice that he was invoking a right under the FMLA. Pfizer contends that it is not enough simply to assert that the employer had notice of plaintiff's need for leave for a reason covered by the FMLA, Strickland, 239 F.3d at 1207-08, but that more is required to establish violation of the proscriptive sections of the Act, (Def.'s Mem. at 23). More particularly, Pfizer argues, an employer must

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leave. Likewise, Walthall, 18 F.Supp.2d at 1383, is inapposite. In that case, the court concluded that the employee affirmatively chose to take paid leave rather than to request FMLA leave, and the employer did not, at any time, require the plaintiff to substitute paid sick leave for FMLA leave. Dotson apparently took paid leave because he believed that is what Burnell told him to do and because he believed that FMLA leave would not be available to him until he exhausted his paid leave. While an employer can certainly require an employee to exhaust paid leave and count such leave against the twelve-week period of leave permitted under the FMLA, an employer may not require an employee to use paid leave in lieu of FMLA leave in order to remove the employee from the protections of the FMLA.

know, not only that an employee could qualify for or is entitled to FMLA leave, but also that the employee actually plans to or is using FMLA leave, to stablish the requisite knowledge that would permit an inference of intent. According to Pfizer, "[t]he issue here is not whether Dotson gave the company notice of his need for leave that was covered by the Act, but whether Dotson gave the company notice that he was exercising rights under the FMLA." (Def.'s Mem. at 23.) This court disagrees.

Construing the facts in the light most favorable to Dotson, Pfizer knew as early as February 2003 that Dotson and his wife were trying to adopt a child. (Dotson Dep. at 275.) Dotson called to ask Burnell of Human Resources about FMLA leave prior to his trips to Russia.[13] Dotson also kept his supervisor, Kennedy, informed of the progress of the adoption process. (Kennedy Dep. at 160-62, 208-09, 230.) Whether or not Dotson formally applied for

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[13] Strickland is distinguishable. In that case, Strickland alleged that he informed his supervisor before leaving work on a given day that he needed FMLA leave because he was suffering a diabetic attack. "The record presented to the district court on summary judgment, however, contained no support for this allegation; nothing in Strickland's affidavits or the other materials before the court would permit a jury to find that Harmon or anyone else employed by the [decision-maker] had notice that Strickland was invoking the protection of the FMLA when he left work that day. Nor did Strickland refer to the FMLA at any time prior to the Board's . . . decision to discharge him." Strickland, 239 F.3d at 1207. At the very least, the record before this court evidences a genuine issue of material fact as to whether Pfizer was aware that Dotson was taking leave for an FMLA-protected purpose and as to whether Dotson sufficiently invoked the FMLA.

FMLA leave, Pfizer was clearly on notice that Dotson was pursuing an adoption, an FMLA protected activity, and that he was taking leave to do so. Any suggestion to the contrary seems overly technical at best and disingenuous at worst. See Williams v. Air Products & Chemicals, Inc., No. 3:04-cv-93/LAC, 2005 WL 2007098, *4 (N.D. Fla. 2005 Aug. 16, 2005) ("given the fact that Defendant was fully aware that Plaintiff's leave was FMLA-qualifying and that Plaintiff was terminated immediately after his intended return from leave, or perhaps even during his time on leave, the Court must similarly conclude that Plaintiff's termination during or following his exercise of FMLA leave was retaliatory"); Miller v. GB Sales & Service, Inc., 275 F.Supp.2d 823 (E.D. Mich 2003) (where defendant employer argued that it could not have formed the requisite intent to retaliate where plaintiff only asked employer to consider her leave as FMLA leave after she was terminated, the court found that plaintiff had requested and taken leave prior to termination and had informed employer that she needed leave because of diabetes and depression and that employer knew that majority of employee's absences were protected by the FMLA for purposes of plaintiff's retaliation claim). See also 29 C.F.R § 825.302(c) and cases, *supra* at 18-19. The fact that Dotson used paid vacation time to travel to Russia does not require the conclusion that Dotson's discharge was not motivated by a desire on the part of Pfizer to retaliate against him for taking leave to adopt a child. Moreover, because Dotson has testified that he was told by Pfizer that he was not eligible to take FMLA leave, the court cannot accept, for purposes of this motion, Pfizer's representation that

Pfizer did not know that Dotson was attempting to take FMLA leave. Pfizer's intent is necessarily an issue of material fact that is in dispute.

2. Legitimate, Nondiscriminatory Reason for Discharge

Pfizer argues that Dotson was discharged for a legitimate, nondiscriminatory reason and that there is no evidence that Pfizer retaliated against Dotson because he exercised FMLA rights. In that Pfizer need not persuade the court that it was actually motivated by its stated reason for dismissing Dotson, the court must conclude that Pfizer has met its burden of producing a legitimate, nondiscriminatory reason for its decision to terminate Dotson's employment, i.e., Dotson's violations of the starter policy. The burden thus rests on Dotson to show that Pfizer's rationale was pretextual. The prima facie case, taken together with evidence that Pfizer's reason for terminating was unworthy of credence may give rise to an inference of discrimination.

3. Pretext

"An employee can demonstrate pretext by showing weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's . . . reasons for its action. . . .Also, the timing of an adverse employment action may be sufficient to create an issue of fact with regard to whether an employer's articulated nondiscriminatory reasons are pretextual."

Blankenship, 140 F. Supp. 2d at 675 (internal quotations and citations omitted).

To the extent Pfizer claims violation of its starter policy supported discharge, Dotson has raised a genuine issue of material fact as to the legitimacy and veracity of the stated rationale. First, the Pfizer Starter Guide does not explicitly prohibit NHO personnel from possessing or distributing starters. (Lalley Dep. at 46; McElerney Dep. at 94-95, 97-98; Batura Dep. at 18-19; Hodges Dep. at 30-31, 51; Dotson Aff. ¶ 3.)[14] Nor does any other written policy of Pfizer's restrict NHO employees from handling starters. (Hodges Dep. at 30-32.) Kennedy specifically testified that there is no specific policy that says NHO is not allowed to handle starters. (Kennedy Dep. at 188.) Pfizer maintains, however, that it is understood that NHO employees do not handle starters because of various legal issues that could arise as a result of such conduct. NHO Mid-Atlantic Regional Manager John Lalley testified that "normal procedures" would seem to prohibit NHO

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[14] Pfizer opines that, despite the Starter Guide's silence on the issue of NHO employees, "[t]o a reasonable person who is not trying to evade the rules, the Guide would be a clear limitation on which employees may handle starters." (Reply Br. at 6.) Dotson's testimony, as well as the testimony of other employees present at the meeting at which he shared the news of his impending trip to Russia and his plan to take Zithromax to the orphanage, along with the testimony of the sales representatives who provided Dotson with the starters, all suggest quite strongly that Dotson was making no attempt whatsoever to "evade the rules." Rather, Dotson was quite open about his conduct and his intent. Indeed, the testimony of most of these individuals suggests that not many employees knew what the rules were.

employees from using starters: NHO employees' computers are not set up to record starter transactions, and NHO employees do not generally call on primary care physicians. (Lalley Dep. at 46-47.) The lack of a written policy raises an issue of fact as to whether such a well-known prohibition actually existed and as to whether the violation of the alleged policy motivated the termination of Dotson's employment.

Second, supervisor Kennedy allegedly knew that Dotson planned to take Zithromax to Russia and said nothing. Kennedy acknowledges that Dotson told him as early as 11 September 2003, of his plan to take Zithromax to Russia. (Kennedy Dep. at 214, 229.) Despite Pfizer's contention that there was a well-known policy preventing NHO employees from handling starters, Kennedy's failure to inform Dotson of any such policy, to require Dotson to return the starters, or to reprimand him for obtaining starters from sales representatives suggests, at the least, that Kennedy was unaware of any such policy.[15] Moreover, other Pfizer employees who were aware that Dotson planned to take Zithromax to Russia, including another RAM and two Clinical Education Consultants (CECs) within NHO, testified that they did not know it was against any particular Pfizer policy for Dotson to have starters in his possession or to take the Zithromax to

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[15] Kennedy has clearly testified that he told Dotson on September 11 that Dotson was not supposed to have starters and that he should call sample compliance. (Kennedy Dep. at 214.) The court will construe the facts in the light most favorable to Dotson.

Russia. (Gouveia-Pisano Dep. at 69.) Moreover, Ann Hodges, a Human Resources employee who participated in the decision to terminate Dotson, testified that she "[didn't] know" the starter policy relating to NHO personnel. (Hodges Dep. at 32.) This testimony raises a genuine issue of material fact as to whether Pfizer even had in place a policy pertaining to the handling of starters by NHO employees, not to mention whether the policy was well-known.

Dotson has also produced evidence that, although he was terminated, allegedly for mishandling starters, the individuals who provided him with the starters in violation of Pfizer's policy were not even disciplined for their allegedly inappropriate and illegal conduct. (Stalker Dep. at 33.) Pfizer's starter policy required managers and supervisors to be well-versed in and adequately enforce the policy. (Batura Dep., Ex. 146 ("These disciplinary actions also apply to a manager who directs or approves the person's improper actions, is aware of those actions but does not act appropriately to correct them, or otherwise fails to exercise appropriate supervision.")). Kennedy did not inform Dotson of the applicable policy, nor did he discipline him for a violation of that policy upon learning of it, nor did he take any action, upon learning of Dotson's intent, to stop Dotson from taking the starters overseas. Kennedy was not disciplined for his failure to provide appropriate guidance and to enforce the starter policy, a fact which suggests that he, unlike Dotson, was not expected to know the policy, or that Pfizer did not think his violation, which essentially enabled Dotson's transfer of starters to Russia, was

that serious, or that the policy itself was not that well-known and that a violation of it would not necessarily warrant termination.[16] These issues of fact preclude summary judgment in favor of Pfizer at this point in the proceedings.

Finally, despite Pfizer's alleged conclusion that Dotson's conduct in donating starters to an orphanage in Russia was unprecedented,[17] and despite the fact that Pfizer allegedly considered Dotson's conduct so egregious as to put Pfizer at serious risk under the applicable federal laws and regulations, Pfizer did not report the alleged violations committed by Dotson, Jones, Stalker, or Kennedy to the FDA until nearly one year after Dotson initiated this lawsuit. This report was made after Pfizer's starter compliance officer was deposed and after counsel requested pertinent reports from that officer. Under Pfizer's policy, any violations should be reported to the FDA within five days. The failure to report the violation raises a question as to the perceived seriousness of that violation. The numerous factual issues raised by the testimony of

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[16] To the extent that it was allegedly the donation of the starters overseas as opposed to the acquisition of the starters that merited termination, John Lalley, one of Dotson's former supervisors testified that he had "no idea what [Pfizer's] policy would be around that," referring to Dotson's receiving and then donating a starter drug to an orphanage in Russia, and whether it was conduct for which Pfizer would normally terminate an employee. (Lalley Dep. at 89.)

[17] Dotson testified to his belief that over his 15 years at Pfizer the company made donations of short-dated samples, particularly when health care providers were going on medical mission trips. (Dotson Dep. at 42.)

the various deponents in this case pertaining to the allegedly pretextual nature of Pfizer's stated reason for terminating Dotson's employment preclude summary judgment in favor of Pfizer.

VI. Conclusion

For the foregoing reasons, defendant's motion for summary judgment is DENIED.

This 10 March 2006.

W. Earl Britt
Senior U.S. District Judge

jdd/pi

Supreme Court, U.S.
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No. 08-1479

IN THE

Supreme Court of the United States

JAMES D. DOTSON,

Cross-Petitioner,

v.

PFIZER, INC.,

Cross-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit err by denying the Petitioner prospective equitable relief under the Family and Medical Leave Act because of the amount of retrospective relief in the form of liquidated damages?

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James D. Dotson ("Cross-Petitioner" or "Dotson") respectfully cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit" or "Court of Appeals") in this case.

OPINION BELOW

The opinion of the Court of Appeals is reported at 558 F.3d 284, and is reprinted in the Appendix to Petitioner's Petition for a Writ of Certiorari ("Pet. App.") at 1a – 36a. The opinion of the District Court denying Dotson's request for a prospective equitable remedy is reprinted in Pet. App. at 37a – 58a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 2009. Dotson expressly relies upon Rule 12.5 as the jurisdictional basis for this Cross-Petition for a Writ of Certiorari. Petitioner's Petition for a Writ of Certiorari was docketed on June 2, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

The statutes involved in this cross-petition are found in the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, *et seq.* The principal statute involved in this cross-petition is 29 U.S.C. § 2617(a)(1)(B), which states as follows:

Enforcement

(a) Civil action by employees

(1) Liability

Any employer who violates section 2615 of this title shall be liable to any eligible employee affected —

. . . .

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

STATEMENT OF THE CASE

Introduction

This cross-petition is about the proper remedial structure of the FMLA. The fundamental remedial purpose of the FMLA is to make a successful plaintiff-employee whole for all losses caused by the unlawful acts of the defendant-employer. *See Arban v. West Pub. Corp.*, 345 F.3d 390, 406 (6th Cir. 2003); *see also Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81, 89 (2002) (recognizing the comprehensive remedial mechanism of the FMLA as including appropriate equitable relief under 29 U.S.C. § 2617(a)(1)(B) that is tailored to the harm suffered). To effectuate this purpose, Congress created two separate and distinct categories of remedies under the FMLA – retrospective relief and prospective relief. *See* 29 U.S.C. § 2617(a)(1). This case presents the important question of whether it is proper for the courts

to deny a successful plaintiff prospective relief under the FMLA because of the amount of retrospective relief awarded in the form of liquidated damages.

Following a lengthy trial, the jury found that Petitioner Pfizer, Inc. ("Petitioner" or "Pfizer") violated the FMLA by firing Dotson in retaliation for taking FMLA-protected leave to adopt a child from a Russian orphanage. The District Court awarded Dotson retrospective relief under 29 U.S.C. § 2617(a)(1)(A) in the form of lost wages from the time of his termination to the time of the court's judgment (i.e. "back pay") and liquidated damages.

The District Court, however, erroneously denied Dotson prospective relief under 29 U.S.C. § 2617(a)(1)(B) in the form of the future pay (i.e. "front pay") that he would have received but for Pfizer's unlawful actions on the grounds that the retrospective liquidated damages award was sufficient to make Dotson whole. Likewise, the Fourth Circuit erroneously approved the District Court's use of this retrospective remedy to deny Dotson all prospective relief to which he is entitled under the FMLA. As a result, Dotson was not made whole for losses caused by Pfizer's unlawful acts.

These holdings ignore the fundamental remedial purpose of the FMLA in failing to make successful plaintiff-employees whole for losses caused by the unlawful acts of defendant-employers. If this Court grants Pfizer's Petition for a Writ of Certiorari, it should also review the lower courts' decisions to that Congress did not intend for courts to deny a successful plaintiff-employee the right to be made whole by awarding only retrospective relief instead of awarding the separate and distinct category of prospective relief provided for by the FMLA.

Background

Dotson began his career with Pfizer in 1988 and rose rapidly through its corporate ranks. JA 910, 913-21, 1979, 2754-58.[1] Indeed, Dotson rose from an entry-level sales position to District Manager in 1991, Director of Management Training and Development in 1997, Regional Manager in 1998, Institutional Healthcare Account Manager ("IHAM") in 2002, and Regional Account Manager in Pfizer's National Healthcare Organization ("NHO") in 2003. JA 913-21, 2754-58. His compensation kept pace, rising to more than $232,000.00 at the time of his wrongful termination. JA 2626R-26S, 2776-77, 2995-97. When terminated, Dotson had also accrued a ***guaranteed***, lump sum retirement annuity totaling $1.37 million. JA 2626DD-26EE, 2777, 3079, Proscia Dep. 90-101, 105, 110-11.[2]

Dotson excelled while employed by Pfizer. JA 912-14, 916, 920-25, 931-39, 2754-58. Indeed, Dotson was asked to work directly with the President of Pfizer's Pharmaceutical Group, and he received numerous letters of commendation, including letters from Pfizer's CEO, the Governor of North Carolina, the Executive Director of North Carolina's State Health Plan, and the CEO of the University of North Carolina Health System. JA 952-60, 962-63, 2660, 2662-65, 2669-70.

In February 2003, Dotson began working with the America World Adoption Association ("AWAA") to adopt

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1. References to "JA" are to the Joint Appendix filed by the parties in the Fourth Circuit on January 14, 2008.

2. This deposition transcript was admitted into evidence at trial.

a child from Russia. JA 972-73, 983-84. Dotson's family agreed to accept placement of a child with potentially serious medical problems. JA 999-1001. Dotson informed Pfizer of his plans in February 2003 and kept Pfizer's management fully apprised throughout each stage of the time-consuming adoption process. JA 975, 981-86, 995-96, 1008-09, 1046-50, 1084-86, 1210-11, 1618-21, 2218, 2633, 2645, 2716, 2801.

On August 27, 2003, the Dotsons learned that they had been selected to adopt a baby girl and would need to make at least two trips to Russia to complete the adoption. JA 725, 982-83, 999-1000, 1004, 1008, 1021, 1037-38, 1404. Dotson informed Pfizer about the two trips and other adoption-related absences that he would be required to take before traveling to Russia. JA 981-93, 1008, 1038, 1084-86, 1370-71, 1459, 1615-20, 2218. Dotson's leave was approved by Pfizer, but Pfizer never properly designated it as FMLA-protected leave.[3] JA 1370-71, 1459; Petitioner's Appellate Brief at 46.

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3. Dotson had no knowledge regarding his FMLA rights prior to traveling to Russia. JA 1050, 1367. When he attempted to ascertain his options for leave, Dotson was erroneously informed by Pfizer that he would have to "burn up" all of his vacation leave before his right to FMLA benefits would "kick in." JA 1049-50. Based on this erroneous information, Dotson never requested FMLA leave. JA 1049-50, 1211, 1364. Despite Pfizer's knowledge of Dotson's pending adoption and his need for leave, no one ever notified him of his FMLA rights, suggested that he apply for FMLA leave, or otherwise inquired to determine if the leave should be designated as FMLA-protected. JA 1048-51.

The Dotsons learned from the AWAA that adoptive parents customarily bring gifts such as clothing or medical supplies to an orphanage when adopting a child. JA 755-56, 1009, 1065, 1236-37, 1404. These supplies are needed because of the lack of resources available to the orphanages. JA 755-56, 1009-11, 1065, 1404. Adoptions are not conditioned in any way upon such gifts. JA 1010, 1014, 1368, 1370.

Dotson believed that he was in a unique position to offer much-needed medical supplies to the orphanage. JA 1010-11, 1065-66, 2814. Accordingly, Dotson requested samples (referred to by Pfizer as "starters") of the antibiotic Zithromax that were close to their expiration date (and would otherwise have been destroyed) to donate. JA 1012.

On September 4, 2003, a Pfizer employee named Bridget Jones provided Dotson with a case of Zithromax. JA 1016-20, 1040, 1489-90. Jones successfully entered the transaction into starter tracking software on her computer the same day. JA 1483, 1500. The software on Jones' computer did not reject or flag the transfer to Dotson. JA 1499-1500. Dotson tried to document the transfer from Jones himself. When his tracking software did not function properly, he immediately contacted Pfizer's Help Desk, which informed him that his computer was not programmed to document transfers. JA 1027-28, 1030-33. Dotson also mentioned the transfer to his supervisor, Chris Kennedy, who said nothing. JA 1017-18, 1030-33, 1319. Jones was never disciplined for the transfer and did not perceive that it violated Pfizer policy. JA 1497, 1507, 1890-91, 2113-14.

On September 8, 2003, while in a meeting with Kennedy and other Pfizer personnel, Dotson received word that he and his wife would need to travel to Russia on September 21, 2003, as part of the adoption process. JA 1020-21, 1036. Dotson shared the good news and his plan to donate Zithromax to the orphanage. JA 1020, 1022-24, 1411-17, 1458-59, 1808-10. Kennedy was outwardly irritated by the disruption and consequent discussions of the adoption. JA 1022-24. However, neither Kennedy nor anyone else who was present communicated any problem or policy violation associated with Dotson's plan to donate the Zithromax. JA 1022-24, 1032-34, 1411-17, 1458-59, 1808-10. In fact, one co-worker actually told Kennedy that she "was very excited that Jim was going to be able to take samples over to Russia." JA 1417. Kennedy did not respond in any way that would suggest that the donation would violate company policy. JA 1417.

On both September 5 and 11, 2003, Dotson explained to Kennedy that his computer was not programmed to enter starter transactions, asked Kennedy to manually record his receipt of the Zithromax in Pfizer's tracking system, and instructed Kennedy how to do so. JA 1024, 1027-28, 1030-33. Although Kennedy knew that Dotson was leaving for Russia ten days later, he never objected to the Zithromax transfer or donation. JA 1032-33, 1623.

On September 15-17, 2003, Dotson attended a NHO conference in Florida with Kennedy and Kennedy's direct supervisor, Patrick McElerney. JA 2224. Before the conference, Kennedy told McElerney that Dotson intended to donate Zithromax to the orphanage. JA 1033,

1328-29, 2220-21, 2224-26, 2231-32. McElerney, however, ***never*** spoke to Dotson about the starters, ***never*** advised Dotson that he was not permitted to receive or handle starters, and ***never*** advised Dotson that donating the starters would violate Pfizer's policy. JA 1033-34, 2224-26, 2231-32. Likewise, before Dotson left for Russia, Kennedy ***never*** advised Dotson that he was not permitted to receive or handle starters, ***never*** instructed Dotson to return the Zithromax, ***never*** instructed Dotson that his donation would violate Pfizer policy, and ***never*** reported Dotson's receipt of the starters to anyone at Pfizer. JA 1017-18, 1032-33, 1626-27, 1707-08.

Neither Kennedy nor McElerney reported Dotson's alleged violation of the starter policy ***before*** he left for Russia, when it was still preventable. JA 1033-34, 1626-27, 2231. In fact, McElerney admitted that he thought there was a violation of starter policy the minute that Dotson came into possession of the Zithromax. JA 2231. However, they waited until ***after*** Dotson left for Russia to report the alleged violation. JA 2203.

On November 11, 2003, a little over two weeks after Dotson returned home with his new daughter, he was informed that he was being fired for violating Pfizer's starter policy. JA 1120, 1123-27, 1130-31. Pfizer told Dotson that NHO employees were prohibited from possessing starters and that his donation created the appearance of a *quid pro quo* and put the company at risk. JA 1123-27, 1130-32, 2132, 2739, 2743.

The handling and use of starters is highly regulated by the Food and Drug Administration ("FDA") under

the Prescription Drug Marketing Act ("PDMA"), 21 U.S.C. § 353, *et seq.* JA 1838, 1851, 2656-57. To insure compliance with the PDMA, Pfizer has developed and distributed detailed and exhaustive policies and procedures for its employees to follow. JA 2656-59, 2684-2709, 2912-71. These policies prohibit transferring starters to someone who lacks the authority to possess them. JA 1889-90, 1894-95, 2112. Pfizer requires any employee who learns of a starter violation to report the violation immediately. JA 1423, 2450-51, 2658-60. The failure to report or otherwise prevent a known violation is itself a violation of Pfizer's policies. JA 2385-86, 2658-60.

Pfizer's policies, however, do ***not*** prohibit NHO personnel from possessing or distributing starters. JA 946-48, 1060, 1093-94, 1842-43, 2465-66, 2656-59, 2684-2709, 2912-71. There is ***no written*** policy that addresses NHO personnel handling starters, a fact confirmed at trial by Pfizer's Director of PDMA in Starter Administration. JA 946-48, 1060, 1093-94, 1842-43, 2656-59, 2684-2709, 2912-71. Pfizer does not train NHO personnel or sales representatives on any such policy. At trial, a Pfizer representative testified specifically that Dotson never received any such training either before or after joining NHO. JA 947-48, 1842-43, 2103, 2105.

With the exception of Kennedy, McElerney, and other individuals responsible for Pfizer's decision to terminate Dotson, not one Pfizer employee was aware of the starter prohibition that Pfizer used to justify Dotson's termination. For example, none of Dotson's NHO colleagues were aware of a policy prohibiting NHO

employees from handling starters. JA 1415-17, 1451-53, 1458-59, 1497, 1507, 1539-40, 1802-05, 1809-10. Even NHO Regional Manager John Lalley testified that he had "no idea what [Pfizer's] policy would be" regarding Dotson's receipt of starters while employed within NHO. JA 2479.

Nevertheless, Kennedy, McElerney, and the other individuals responsible for deciding to terminate Dotson testified that the policy was just "known" to exist. JA 1627, 2106-08, 2118, 2122-23, 2204, 2219, 2399-2400, 2438, 2442-43, 2451-52, 2470. Even though both Kennedy and McElerney supposedly knew of this policy and knew that Dotson planned on donating Zithromax to the Russian orphanage, neither made any attempt to stop Dotson, report him, or otherwise prevent his "violation" before he left for Russia. JA 1033, 1624-26, 1707-08, 2225-26, 2231-32. Significantly, Dotson was the only employee disciplined for his part in the alleged violation of the starter policy. JA 1497, 1507, 1543, 1577-78, 1890-91, 1894-97, 2109-14. Both Kennedy and McElerney knew of the transfer and Dotson's plans to donate the starters to the orphanage but failed to prevent or timely report the alleged violation. JA 2114, 2281, 2395. In fact, Steve Harper, a NHO Vice-President and member of the group that reached the decision to terminate Dotson, admitted that both McElerney's and Kennedy's actions also ***contributed to*** the appearance of a *quid pro quo*, yet neither was disciplined in any way. JA 2386.

Further, even though Jones transferred the starters to Dotson, Pfizer did not discipline or warn her for her part in the alleged violation. JA 1497, 1507, 1890-91, 2109-14. The same is true for Ashley Stalker, who also

transferred samples to Dotson. JA 2109-14. Put simply, even though Pfizer claimed that Dotson's actions were a serious breach of its policies, it failed to take any action against anyone else who was involved in, had knowledge of, or failed to report the alleged violation.

Based upon this compelling evidence of pretext, after an eight day trial in May 2006, the jury found that Pfizer unlawfully interfered with Dotson's FMLA rights and that Pfizer terminated Dotson in retaliation for taking FMLA-protected leave to adopt his daughter. The jury awarded Dotson back pay in the amount of $331,429.25 on his retaliation claim. After trial, Pfizer moved for Judgment as a Matter of Law ("JMOL") and Dotson moved for an award of liquidated damages, attorneys' fees, and front pay. The District Court denied Pfizer's Motion for JMOL and awarded Dotson liquidated damages, attorneys' fees, and costs; however, the District Court denied Dotson's request for front pay. Pet. App. 56a-57a. On appeal, the Fourth Circuit affirmed the District Court's denial of Pfizer's JMOL motion and Dotson's request for front pay.

ARGUMENT

I. This Court Should Grant Certiorari to Resolve an Important Question of Federal Law Regarding The Proper Consideration that Should be Given to an Award of Liquidated Damages When Crafting Equitable Relief to Make an Aggrieved Plaintiff Whole.

A. The Fourth Circuit's Decision Directly Conflicts with the Fundamental Remedial Purpose of the FMLA.

Over the course of his fifteen-year career with Pfizer, Dotson accrued a substantial compensation package that included a salary of $200,000.00 per year, insurance benefits, stock options, 401k contributions, and a $1.37 million retirement annuity. Because of the length of his tenure with and seniority in the company, Dotson has almost no chance of ever replacing – much less exceeding – this package of salary and benefits. By failing to award damages that fully account for these losses, the District Court left Dotson with an incomplete remedy that frustrates the remedial purpose of the FMLA. The Fourth Circuit erroneously approved of the District Court's mistake.

The fundamental remedial purpose of the FMLA – as with all statutes prohibiting employment discrimination – is to ensure that a successful plaintiff is made whole for losses suffered as a result of unlawful discrimination. *Arban*, 345 F.3d at 406. To effectuate this "make whole" policy, Congress recognized that it was important to remediate both pre-judgment and post-

judgment effects of discrimination, and it did so by providing separate and distinct retrospective and prospective remedies under the FMLA. *Compare* 29 U.S.C. § 2617(a)(1)(A)(i), *with* § 2617(a)(1)(A)(ii). For example, to offset future losses, a wrongfully-terminated employee is presumptively entitled to reinstatement to his or her former position. *See Duke v. Uniroyal Inc.*, 928 F.2d 1413, 1423 (4th Cir. 1991);[4] *Arban*, 345 F.3d at 406. Where the relationship between the parties makes reinstatement either inappropriate or unfeasible, as it does here,[5] courts award front pay to "compensate the plaintiff for lost future wages and benefits." *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 526 (5th Cir. 2001). Through an award of lost future compensation, "[f]ront pay is designed to place a plaintiff in the financial position he would have been in had he been reinstated." *Loveless v. John's Ford, Inc.*, 232 Fed. Appx. 229, 238 (4th Cir. 2007) (unpublished); *McInnis v. Fairfield Cmtys., Inc.*, 458 F.3d 1129, 1145 (10th Cir. 2006). This remedial principle both guides and limits a court's discretion in assessing awards of front pay. *See Davoll v. Webb*, 194 F.3d 1116, 1145 (10th Cir. 1999).

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4. Although *Duke* involved claims brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, the FMLA is interpreted consistently with the ADEA and other federal acts that protect employment rights, including the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, and Title VII, 42 U.S.C. § 2000e, *et seq. Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 460-61 (4th Cir. 2007) (FLSA); *Burnett v. LFW Inc.*, 472 F.3d 471, 481 n.5 (7th Cir. 2006) (ADA and Title VII); *Lubke v. City of Arlington*, 455 F.3d 489, 499 (5th Cir.2006) (ADEA).

5. The district court held that reinstatement was not an appropriate remedy. Pet. App. at 43a, n.6. Neither party challenged this finding on appeal.

Over time, however, the lower courts have departed from this explicit statutory scheme and improperly conflated these distinct remedies such that a successful plaintiff can be denied *all* prospective relief based solely upon the retrospective relief awarded by the jury. *See, e.g., Palasota v. Haggar Clothing Co.*, 499 F.3d 474, 490-91 (5th Cir. 2007); *Downes v. Volkswagen of Am., Inc.*, 41 F.3d 1132, 1141 (7th Cir. 1994); *United States E.E.O.C. v. Century Broad. Corp.*, 957 F.2d 1446, 1464, n.19 (7th Cir. 1992). In this matter, the District Court denied front pay on the grounds that the liquidated damages award made Dotson whole for all of his future losses. Pet. App. at 49a-50a. The Court of Appeals affirmed, finding that the District Court's consideration of liquidated damages in denying front pay was not an abuse of discretion. Pet. App. at 27a.

Liquidated damages, however, are an inappropriate consideration for a front pay analysis because each measure of damages serves a distinct remedial function under the FMLA. Liquidated damages are intended to serve as retrospective "compensation to the employee [for] the delay in receiving [back pay]." *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 142 (2d Cir.1999); *see also Jordan v. United States Postal Serv.*, 379 F.3d 1196, 1202 (10th Cir. 2004) (agreeing that "'liquidated damages are not a penalty exacted by the law, but rather compensation to the employee occasioned by the delay in receiving [lost] wages'" and stating that "[liquidated] damages under the FMLA should not be considered a 'windfall,' but rather a congressional judgment, enforced by the courts, designed to compensate employees for the obscure damages that occur when one wrongfully loses wages") (quoting *Herman*, 172 F.3d at 142);

Roy v. County of Lexington, S.C., 141 F.3d 533, 548 (4th Cir. 1998) ("'"'Liquidated damages'" are considered compensatory rather than punitive in nature,' *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 71 (2d Cir. 1997) (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945)), and constitute 'compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages.'" *Id.*).

Front pay, on the other hand, is a *prospective* remedy that targets the *post-judgment* effects of discrimination, while liquidated damages are a *retrospective* remedy that target the *pre-judgment* effects of discrimination. *See Roy*, 141 F.3d at 548; *Century Broad. Corp.*, 957 F.2d at 1464. In other words, liquidated damages are an integral component of a *back pay* award and compensate for past *losses* that otherwise would be "too obscure and difficult" to prove. *See Roy*, 141 F.3d at 548; *see also Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-84 (1942), *superseded on other grounds by* 29 U.S.C. § 260; *Hildebrandt v. Ill. Dep't of Natural Res.*, 347 F.3d 1014, 1031 (7th Cir. 2003); *Broadus v. O.K. Indus., Inc.*, 226 F.3d 937, 943 (8th Cir. 2000); *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 934 (11th Cir. 2000); *Reich* 121 F.3d at 70 n.4; *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 907 (3d Cir. 1991); *Renfro v. City of Emporia, Kan.*, 948 F.2d 1529, 1540 (10th Cir. 1991).

Because each measure of damages compensates for losses during a distinct period of time (i.e. the past vs. the future), neither bears any relation to the other. *See Century Broad. Corp.*, 957 F.2d at 1464. Indeed,

there is no logically sound basis upon which to condition a plaintiff's remedy for *future* losses on the size of damages awarded for *past* losses. *See id.* (holding that retrospective remedies have no bearing on prospective relief). In short, liquidated damages are no more relevant to front pay than back pay is to reinstatement.

Congress' intent to define liquidated damages and front pay as distinct categories of damages is also confirmed by the structure of the FMLA itself. Where possible, "[t]he legislative intent of Congress is to be derived from the language ***and structure*** of the statute itself." *Rosmer v. Pfizer Inc.*, 263 F.3d 110, 117 (4th Cir. 2001) (emphasis added) (quoting *United States v. Lanier*, 520 U.S. 259, 268 n.6 (1997)). Indeed, the dichotomy between liquidated damages and front pay is manifest under § 2617(a)(1), a provision of the FMLA in which Congress provided the following remedies:

> (A)(i) back pay;
>
> (A)(ii) prejudgment interest;
>
> (A)(iii) liquidated damages; and
>
> (B) front pay (as a substitute for reinstatement).

See 29 U.S.C. §§ 2617(a)(1)(A)-(B). This statutory structure reflects two distinct types of damages: retrospective damages (i.e., back pay) and prospective damages (i.e., front pay).

By grouping liquidated damages in a single subsection alongside two other backward-looking remedies (back pay and prejudgment interest), Congress confirmed the retrospective nature of liquidated damages. *See* 29 U.S.C. § 2617(a)(1)(A). In contrast, Congress drew a distinct line between the two measures of damages by allowing front pay under a wholly separate subsection of the FMLA that is dedicated to forward-looking remedies. *See* 29 U.S.C. § 2617(a)(1)(B). There is no textual or structural connection between these two provisions. As remedies, liquidated damages and front pay are just as distinct as the remedies of back pay and reinstatement. The fact that Congress separated the remedies and aligned them in distinct groups in the FMLA confirms the fundamental disparity between the two measures of damages.

This conclusion is equally supported by the well-settled principle that "Congress is presumed to enact legislation with knowledge of the law; that is with the knowledge of the interpretation that courts have given to an existing statute." *United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995). Moreover, for more than fifty-years before passage of the FMLA in 1993, courts have recognized that liquidated damages under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, are inherently *retrospective* in nature. *O'Neil*, 324 U.S. at 707; *Missel*, 316 U.S. at 583-84; *Snapp*, 202 F.3d at 933-34; *Jordan*, 379 F.3d at 1202; *Hildebrandt*, 347 F.3d at 1031; *Braswell v. City of El Dorado*, 187 F.3d 954, 957 (8th Cir. 1999); *Roy*, 141 F.3d at 548; *Reich*, 121 F.3d at 71; *Martin*, 940 F.2d at 907; *Powers v. Grinnell Corp.*, 915 F.2d 34, 39 n.6, 41 (1st Cir. 1990) (noting that the

Age Discrimination in Employment Act incorporated the FLSA's remedies and that liquidated damages are meant to compensate for delay in payment); *Laffey v. Nw. Airlines, Inc.*, 740 F.2d 1071, 1095-96 (D.C. Cir. 1984); *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982). In passing the FMLA, Congress specifically stated that the FMLA should be interpreted consistently with the FLSA. *See* S. REP. NO. 103-3, at 35 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 37 ("[The FMLA's] enforcement scheme is modeled on the enforcement scheme of the FLSA . . . . The relief provided in FMLA also parallels the provisions of the FLSA."). Significantly, the FMLA's liquidated damages provision is nearly a verbatim copy of the corresponding FLSA provision with only minor non-substantive differences. *Compare* 29 U.S.C. § 2617(a)(1)(A)(iii), with 29 U.S.C. § 216(b). This history leaves no doubt that Congress intended for liquidated damages to be *retrospective* and to compensate for past losses only.

The Fourth Circuit's decision in this case leaves plaintiffs, such as Dotson, with an incomplete remedy, frustrates the remedial purpose of the FMLA, and directly conflicts with the statutory scheme created by Congress to govern remedial awards under the FMLA.

B. The Fourth Circuit's Decision also Conflicts with Settled Precedent in Other Circuits.

Even assuming that liquidated damages are an appropriate consideration, standing alone, they cannot justify denial of front pay. In so holding, the Fourth Circuit rejected well-settled precedent in several other Circuits. In affirming the District Court, the Court of Appeals noted that numerous courts have explicitly approved of using liquidated damages to limit or outright deny an award of prospective equitable relief. Pet. App. at 27a. However, every other circuit court that has approved of using liquidated damages as a factor in assessing front pay, has recognized that "liquidated damages should play ***only a very small role*** in" the assessment of front pay. *Palasota*, 499 F.3d at 491; *Price v. Marshall Erdman & Assoc., Inc.*, 966 F.2d 320, 326 (7th Cir. 1992).

The Fourth Circuit ignored this standard and instead affirmed a ruling by the District Court in which the amount of liquidated damages was ***the sole factor*** considered in denying front pay. Such a holding was plainly in error. Indeed, even where the award of liquidated damages is substantial, such an award "only makes front pay less appropriate if [the] award would be highly speculative." *Century Broad. Corp.*, 957 F.2d at 1464. As discussed in the following section, Dotson's future losses were not highly speculative. Therefore, the courts below had no basis to consider liquidated damages when assessing front pay.

C. The Fourth Circuit's Opinion Conflicts with the Decisions of Other Circuits Because the Fourth Circuit Placed the Burden on Dotson to Prove that Front Pay was Not Unduly Speculative by Construing All Uncertainty in Favor of Pfizer.

Although speculation is often invoked as a reason to deny or limit front pay, such a concern is "more imaginary than real." *Blum v. Whitco Chem. Corp.*, 829 F.2d 367, 375 (3d Cir. 1987). Courts routinely engage in similar prospective analysis "whenever lost future earnings have to be estimated, as they are routinely in personal-injury cases." *Price*, 966 F.2d at 326.

Recognizing this reality, the D.C. Circuit has held that courts "should not refuse to award front pay merely because *some* speculation about future earnings is necessary." *Barbour v. Merrill*, 48 F.3d 1270, 1280 (D.C. Cir. 1995) (emphasis in original). To do so would construe uncertainty regarding future damages in favor of the unscrupulous employer. *See Abuan v. Level 3 Comm., Inc.*, 353 F.3d 1158, 1180 (10th Cir. 2003). Here, in affirming the district court, the Court of Appeals did precisely that by construing ***all*** uncertainty in favor of Pfizer.

1. *Dotson was entitled to a presumption of continued employment with Pfizer.*

As a successful plaintiff, Dotson was entitled to a presumption that he would have stayed with Pfizer until qualifying for full retirement at age 58. Federal courts "assume, absent evidence to the contrary, that [an]

illegally discharged employee would have continued working for the employer until he or she reached normal retirement age." *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1101 n.8 (8th Cir. 1982); *accord Morse v. S. Union Co.*, 174 F.3d 917, 927 (8th Cir. 1999); *Neufeld v. Searle Labs.*, 884 F.2d 335, 341 (8th Cir. 1989); *MacDissi v. Valmont Indus., Inc.*, 856 F.2d 1054, 1060 (8th Cir. 1988); *Blum*, 829 F.2d at 375-76; *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 727 (2d Cir. 1984); *Ventura v. Fed. Life Ins. Co.*, 571 F. Supp. 48, 49-50 (N.D. Ill. 1983). Indeed, courts have awarded front pay based on nothing more than the plaintiff's stated intent to remain with the employer until ***age 70***. *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340, 1349 (11th Cir. 2000); *see also Pollard*, 412 F.3d at 668. At trial, Dotson testified that he intended to remain with Pfizer until he qualified for early retirement at age 58.[6]

Even if Dotson had not stated his intent to do so, Dotson was entitled to a presumption that he would have remained with Pfizer until at least age 58. *MacDissi*, 856 F.2d at 1060; *Blum*, 829 F.2d at 375-76. Because Pfizer presented no credible evidence to the contrary, this presumption should have controlled and defined the length of the District Court's front pay award. *See Gibson*, 695 F.2d at 1101 n.8. By ignoring this presumption and by affirming the District Court's finding that Dotson's "age, education, and experience"

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6. Significantly, Dotson did not request front pay until the typically-cited retirement age of 65. *See Pollard v. E.I. DuPont De Nemours, Inc.*, 412 F.3d 657, 668 (6th Cir. 2005). Rather, he testified honestly that he intended to retire as soon as he qualified for full benefits and the $1.37 million retirement annuity. JA 2626EE. Dotson's testimony was unrebutted.

made his future with Pfizer unduly speculative, the Court of Appeals presumed that Dotson would have left Pfizer regardless of his unlawful termination. This conclusion freed Pfizer from all liability for future harm caused by its own unlawful acts, *see Abuan*, 353 F.3d at 1180, and treated Dotson's wrongful termination as an illegal harbinger of his otherwise inevitable departure. The court construed all uncertainty about the future ***against*** Dotson, in favor of Pfizer, and violated the fundamental principle that a "wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Abuan*, 353 F.3d at 1180 (quotations omitted); *accord Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265-66 (1946).

2. *Dotson would have continued his employment with Pfizer until age 58.*

All credible evidence confirmed Dotson's stated intent to remain at Pfizer until age 58. Dotson dedicated his career to Pfizer since 1988. JA 910. During his fifteen-year tenure, Dotson rose through Pfizer's corporate ranks and held a variety of management-level positions. JA 913-21. Dotson's compensation at termination confirms his success at the company. JA 2626I.

As is true with many management-level positions, Dotson often uprooted his family to accommodate his job promotions, moving his family six times over 11 years between Georgia, Maryland, New York, North Carolina, and Virginia. JA 913-21. During his tenure with Pfizer, other pharmaceutical companies approached Dotson with offers of employment, but he declined each advance without even attending an interview. JA 2626G-2626H.

Moreover, there is no evidence that Dotson *ever* voluntarily sought employment outside of Pfizer.

Similarly, nothing in Dotson's employment history provided any basis whatsoever to conclude that his future with Pfizer was uncertain. Instead, the evidence demonstrated that Dotson dedicated his career to Pfizer and intended to remain at Pfizer until his retirement. There was no credible evidence that, absent the FMLA violation, Pfizer would have fired Dotson or that he would have left the company voluntarily. In fact, given Dotson's compensation, panoply of benefits, and retirement annuity, it was unreasonable to conclude that there was any likelihood of him leaving Pfizer prior to age 58.

3. *The error in the Fourth Circuit's analysis is confirmed by its approval of the District Court's view of Dotson's employment with GSK.*

Nowhere is the District Court's error more evident than its conclusion that the uncertainty of Dotson's future with Pfizer is "supported by the fact that Dotson secured similar employment, although perhaps not entirely comparable, shortly after trial." JA 3322. In other words, the Fourth Circuit affirmed a ruling that concluded Dotson's future at Pfizer was speculative because he obtained *non-comparable* employment *after* being unlawfully terminated. This conclusion ignores the fact that the only reason Dotson sought employment with GlaxoSmithKline ("GSK") was because Pfizer unlawfully fired him. Holding Dotson's post-termination mitigation efforts against him simply adds insult to

injury. Dotson's employment with GSK demonstrated nothing more than his compliance with the legal imperative to mitigate damages. *See Rodriguez-Torres v. Caribbean Forms Mfr, Inc.*, 399 F.3d 52, 67 (1st Cir. 2005).

4. *The Fourth Circuit failed to critically review the District Court's conclusion that Dotson's prospective damages were speculative.*

Even if this Court were to consider only Dotson's loss associated with the $1.37 million retirement annuity, the Fourth Circuit's error is manifest. Indeed, there is simply no possibility that an award of $331.429.25 in liquidated damages could ever make Dotson whole for an entirely separate $1.37 million loss. An obvious rejoinder to this argument would be that the $1.37 million loss is speculative because Dotson's future at Pfizer was uncertain. *See Century Broad. Corp.*, 957 F.2d at 1464. However, as discussed above, there was no evidence that Dotson ever sought to leave Pfizer or that he was likely to do so in the future, particularly given the substantial retirement annuity that awaited him at age 58.

Further, a comparison of Dotson's pre- and post-termination compensation confirms both the fact and amount of his ongoing – as well as future – losses. Front pay represents "the difference between the earnings [the employee] would have received in his old employment and the earnings he can be expected to receive in his present and future, and by hypothesis inferior, employment." *McKnight v. Gen. Motors Corp.*,

908 F.2d 104, 116 (7th Cir. 1990) (citations omitted); *see Killian v. Yorozu Auto. Tenn., Inc.*, 454 F.3d 549, 557-58 (6th Cir. 2006); *Davoll*, 194 F.3d at 1144; *Downes*, 41 F.3d at 1141 n.8; *Christensen v. Titan Distrib., Inc.*, 481 F.3d 1085, 1098 (8th Cir. 2007) (plaintiff entitled to front pay because post-termination employment provided lower compensation); *McInnis*, 458 F.3d at 1145-46. This analysis encompasses *all* aspects of an employee's compensation, including salary, fringe benefits, *and* retirement plans. *Davoll*, 194 F.3d at 1144; *Blum*, 829 F.2d at 375-76.

Here, Dotson's ongoing and future losses are manifest. While at Pfizer, Dotson's annual compensation, including benefits, totaled approximately $232,000.00. JA 2626I, 2626W, 2626FF-2626NN. Perhaps most significant, Dotson was entitled to a guaranteed retirement annuity that would have paid him a lump sum of $1.37 million when he retired from Pfizer at age 58. JA 2626DD; Pet. App. 46a-47a.[7] In contrast, in the two years following his termination and before trial, Dotson worked as a self employed consultant and earned between $53,000 and $61,000 with no benefits. Pet. App. 46a-47a. This consulting income annualized to approximately $134,000, far short of Dotson's $200,000 salary at Pfizer. JA 2626I-2626J; Pet. App. 46a.

Even when Dotson secured full-time employment several months after trial, his compensation was substantially less than what he earned at Pfizer. In

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7. Although Dotson was fully vested in—and thus certain to receive—this benefit, he lost all right to it upon his termination. JA 2626DD-2626EE, 2776.

August 2006, GSK hired Dotson to work as a trainer. JA 3246, n.5. Even though GSK is the third largest pharmaceutical company in the world, his compensation package differed dramatically. Indeed, the District Court recognized that Dotson earned between $49,000 to $60,000 less in salary, received $16,000 per year less in insurance and 401k benefits, was granted fewer stock options, and had no possibility of a $1.37 million retirement annuity. Pet. App. at 47a. There is no aspect of Dotson's employment at GSK that was equal or superior to his position at Pfizer. Even using the District Court's figures—which do not take full account of his losses—Dotson has lost and will continue to lose at least $64,000 per year in salary and benefits. When proper account is taken of the lost retirement annuity, this figure rises to at least $154,000 per year in lost compensation between Dotson's termination and the date that he would have retired from Pfizer.[8]

This comparison starkly demonstrates the on-going damage that Dotson is suffering because of Pfizer's unlawful conduct and the lower courts' denial of front pay. These losses will continue until Dotson either receives front pay or eventually finds comparable employment, which is exceedingly unlikely.

---

8. At the time of his termination, Dotson had fifteen years to retirement and stood to receive a $1.37 million retirement annuity. This annuity represented more than $90,000 per year in additional income between the time of Dotson's termination and the time he qualified for retirement.

CONCLUSION

For the reasons set forth in the opposition to Petitioner's petition for a writ of certiorari, Respondent contends that this Court should not accept this case for review. In the event that the Court grants the Petition, however, Respondent submits that, to accord fairness and complete justice in this case, the Court should also grant this Conditional Cross-Petition.

Respectfully submitted,

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IN THE

Supreme Court of the United States

PFIZER, INC.,

Petitioner,

v.

JAMES D. DOTSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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STATUTES INVOLVED IN THE CASE

The statutes involved in this case are found in the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, *et seq.* In addition to the statutes cited by petitioner, two other statutes are at issue. The first statute is 29 U.S.C. §§ 2612(c)-(d)(2)(A), which states:

> (c) Unpaid leave permitted
>
> Except as provide in subsection (d) of this section, leave granted under subsection (a) may consist of unpaid leave. . . .
>
> (d) Relationship to paid leave
>
> . . . .
>
> (2) Substitution of paid leave
>
> (A) In general
>
> An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph . . . (B) . . . of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection.

The second statute involved in this case is 29 U.S.C. § 2612(e)(1), which provides:

> (e) Foreseeable leave
>
> (1) Requirement of notice
>
> In any case in which the necessity for leave under subparagraph . . . (B) of subsection (a)(1) of this section is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

STATEMENT OF THE CASE

I. Introduction

Respondent James Dotson brought this action after petitioner fired him in retaliation for taking leave protected by the FMLA to adopt a child from a Russian orphanage. Following a lengthy trial, the jury found that Petitioner Pfizer, Inc. ("petitioner" or "Pfizer") violated the FMLA by firing Dotson in retaliation for taking FMLA-protected leave to adopt his child. The Fourth Circuit correctly affirmed the District Court's denial of petitioner's motion for JMOL on Dotson's claim of retaliation.

This case presents no question of federal import nor does it arise from a split in circuit authority. Despite petitioner's arguments to the contrary, its decision makers had ample notice that Dotson's leave was protected by the FMLA. Indeed, petitioner acknowledges that it was advised of Dotson's plan to adopt and his need for adoption-related leave. Petition for Certiorari ("Cert. Pet.") at 6-7. It is also undisputed that petitioner's decision makers knew Dotson had taken an adoption-related leave when they decided to terminate his employment. *See* Cert. Pet. at 3-4 ("the decision makers . . . knew . . . that Dotson had used his . . . paid time off to take two trips to Russia to complete the adoption"). Inexplicably, petitioner claims that Dotson failure to expressly invoke the FMLA or formally apply for FMLA leave removed him from under the Act's protection against retaliation. This position is not supported by statute, regulation, or case law.

At trial, Dotson proved that the decision makers who ordered his termination were motivated by retaliatory animus and that petitioner's proffered reason for terminating Dotson was a pretext for discrimination. It is clear that the decision makers were aware of Dotson's adoption-related leave even if petitioner failed to properly designate the leave as protected. Appropriately, the jury rejected petitioner's proffered explanation of its decision to terminate Dotson and returned a verdict in favor of Dotson that petitioner unlawfully interfered with Dotson's FMLA rights and fired him in retaliation for taking adoption-related leave. JA 3029-30.[1]

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1. References to "JA" are to the Joint Appendix filed by the parties in the Fourth Circuit on January 14, 2008.

II. Background

A. Dotson's employment with petitioner.

Dotson began his career with petitioner in 1988 and rose rapidly through its corporate ranks. JA 910, 913-21, 1979, 2754-58. Dotson rose from an entry-level sales position to District Manager in 1991; Director of Management Training and Development in 1997; Regional Manager in 1998; Institutional Healthcare Account Manager ("IHAM") within petitioner's National Healthcare Organization ("NHO") in 2002; and Regional Account Manager ("RAM") in 2003.[2] JA 913-21, 927, 939-40, 2754-58. Dotson excelled while employed by Pfizer. JA 912-14, 916, 920-25, 931-39, 2754-58. Indeed, Dotson's performance resulted in national sales awards and numerous letters of commendation from both petitioner and its customers. JA 912-14, 916, 920-25, 931-39, 952-60, 962-63, 2660, 2662-65, 2669-70, 2754-58.

Petitioner attempts to portray Dotson's 2002 assignment to the newly created IHAM position as a demotion. *See* Cert. Pet. at 6. However, Dotson was placed in one of only two pilot positions nationwide, suffered no reduction in compensation, and received nothing to indicate deficiencies in his job performance. JA 940-41. In fact, until his unlawful termination, Dotson was never disciplined during his employment. JA 912, 2754-58. As an IHAM, Dotson again excelled. JA 941-42, 952-60, 962-63, 2660, 2662-65, 2669-70.

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2. His compensation kept pace, rising to more than $232,000.00 at the time of his wrongful termination. JA 2626R-26S, 2776-77, 2995-97.

In June 2003, petitioner phased out the IHAM program and Dotson was reassigned to a position as a RAM. JA 962, 966-71, 965, 969, 2669, 2744-45, 2754-58. As part of the transition, Dotson began reporting to Managed Market Manager Chris Kennedy, who in turn reported to Regional Manager Patrick McElerney. JA 967-68, 2190, 2350.

B. Dotson's decision to adopt.

Approximately four months before Kennedy became his supervisor, Dotson and his wife began working with the America World Adoption Association ("AWAA") to adopt a child from Russia. JA 972-73, 983-84. Dotson informed petitioner of his plans in February 2003 and kept petitioner fully apprised throughout each stage of the time-consuming process. JA 975, 981-86, 995-96, 1008-09, 1046-50, 1084-86, 1210-11, 1618-21, 2218, 2633, 2645, 2716, 2801. Dotson also contacted petitioner's third-party benefits contractor, HR Connect, to inquire about adoption benefits. JA 974-75, 2801-02

On August 27, 2003, the Dotsons learned of their selection to adopt a baby girl and that they would need to make two trips to Russia to complete the adoption. JA 725, 982-83, 999-1000, 1004, 1008, 1021, 1037-38, 1404. Dotson informed petitioner about the two trips, as well as other adoption-related absences that he would be required to take, before traveling to Russia. JA 981-93, 1008, 1038, 1084-86, 1370-71, 1459, 1615-20, 2218. Dotson's leave was approved by petitioner but petitioner never properly designated it as FMLA-protected leave. JA 1048-50, 1370-71, 1 59. Dotson attempted to ascertain his leave options but was erroneously informed

by one of petitioner's HR Representatives that he would have to "burn up" all of his vacation leave before his right to FMLA benefits would "kick in."[3] JA 1049-50. Based on this erroneous information, Dotson never requested FMLA leave.[4] JA 1049-50, 1211, 1364. Instead, Dotson took paid vacation to travel to Russia for the adoption. According to Dotson, "that is what I was told I had to do." JA 1211.

Despite petitioner's knowledge of Dotson's pending adoption and his need for leave, petitioner never notified him of his FMLA rights, suggested that he apply for FMLA leave, or otherwise inquired to determine if the leave should be designated as FMLA-protected. JA 1048-51. It is undisputed that petitioner never presented Dotson with the option of taking unpaid leave in lieu of paid vacation for the adoption. JA 1211.

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3. Specifically, Dotson contacted Amy Burnell, an HR Representative in Petitioner's Mid-Atlantic region. JA 1049-51. Burnell was not Dotson's regional HR representative; however, Dotson had previously worked with Burnell and was friends with Burnell. JA 1049, 1051, 1313. Dotson felt more comfortable speaking with Burnell because he was new to the Southeast Region and because he did not know the HR specialist in the Southeast Region. JA 1050-51.

4. At trial, Burnell admitted informing Dotson he would have to use his vacation first, but she denied telling him that the FMLA would only apply thereafter. JA 2239-40. Burnell did not make a record of Dotson's call despite routinely documenting such calls from employees within her region. JA 2240. Obviously, the jury was free to reject Burnell's contradictory testimony and believe Dotson's testimony.

C. Hostility of Dotson's Supervisors.

Kennedy and McElerney were outwardly hostile towards Dotson throughout the adoption process. For example, Kennedy became annoyed when Dotson asked Kennedy to help by filling out paperwork necessary for the adoption. JA 974-75, 977-81, 2803. Kennedy and McElerney consistently harangued Dotson over work assignments, missed meetings and deadlines, tasks purportedly not completed in a timely manner, and an alleged failure to focus on new accounts. JA 986, 1046-48, 1051-56, 1084-88, 1090-92, 1109-14, 1129-30, 1214-15, 1364-65, 1628-29, 1633-34, 1643-44, 1648-49, 1655, 1657-59, 1683-88, 1692-93, 1698-99, 1701-06, 1760-64, 1772-73, 1778-81, 1787-90, 2213-15, 2226-29, 2628-30, 2642, 2652-55, 2667, 2714-16, 2719-22, 2724-25, 2791-2800.

Kennedy grew so intolerant and suspicious of Dotson's adoption-related absences that he called Progress Energy (Dotson's electric utility) and impersonated Dotson in an effort to determine if Dotson had, as claimed, filed a late report due to a power outage caused by Hurricane Isabel. JA 1658-64, 1774-80, 2719-22. Kennedy perjured himself on the stand in an effort to conceal this deception. *Compare* JA 1662-64, *with* JA 2044-45, 2048-51, 2063-64, Tr. Ex. 140 (reprinted in the Appendix to this Response ("Resp. App.") at 1a).

Kennedy's hostility towards the adoption is perhaps most evident from his October 23, 2003, response to an email from Dotson during his second trip to Russia. Dotson wrote that he and his wife had just become "the proud parents of a little girl," that she was sick and hospitalized, and that his return to work might be

delayed. JA 1683-86, 2652, 2716. Instead of offering congratulations or showing concern, Kennedy expressed irritation toward Dotson's travel delays, hounded him about work, and ordered him to come back for a meeting in early November. JA 2652, 2716. Moreover, five days after Dotson returned from his second trip to Russia, Kennedy ordered Dotson to attend an out-of-town client dinner despite Dotson's objection and request to stay home with his newly adopted child who was still seriously ill. JA 1688-89, 1787, 2643-44. Even petitioner has acknowledged animosity between Kennedy and Dotson. *See* Petitioner's Appellate Brief at 9.

D. Dotson's Donation of Antibiotics to the Russian Orphanage.

Dotson and his wife learned from AWAA that adoptive parents customarily bring gifts, such as clothing or medical supplies, to an orphanage when adopting a child. JA 755-56, 1009, 1065, 1236-37, 1404. These supplies are needed because of the lack of resources available to the orphanages. JA 755-56, 1009-11, 1065, 1404. Adoptions are not conditioned in any way on such gifts. JA 1010, 1014, 1368, 1370. A Russian court granted Dotson and his wife custody of the child, not the orphanage. JA 1010, 1014, 1368, 1370.

Dotson believed that he was in a unique position to offer much-needed medical supplies to the orphanage. JA 1010-11, 1065-66, 2814. Accordingly, Dotson requested samples (referred to by petitioner as "starters") of the antibiotic Zithromax that were close to their expiration date (and would otherwise have been destroyed) to donate. JA 1012. Dotson thought that he

was permitted to receive starters as an NHO employee because (1) petitioner never told or trained him otherwise, (2) petitioner sent him 17 unsolicited cases of Viagra starters after he began working in NHO, (3) his laptop still had starter tracking software after he began working at NHO, and (4) petitioner reimbursed him for a starter storage unit for over eight months after he began at NHO. JA 946-51, 1014, 1017-18, 1027-29, 1030-33, 1059-60, 1115-16, 1133, 1271-72, 1348-49, 1389-93, 2103, 2105, 2674-75, 2759, 2798.

Dotson did not hide his intention to donate Zithromax. JA 1385. He did not believe that anyone, including John Lalley, his NHO area manager until June 2003, would have a problem with him doing so. JA 1390. Moreover, Dotson testified that he would not have made the donation or obtained the starters if he had any indication that petitioner would have opposed him doing so. JA 1391.

On September 4, 2003, a Pfizer employee named Bridget Jones provided Dotson with a case of Zithromax. JA 1016-20, 1040, 1489-90. Jones successfully entered the transaction into starter tracking software on her computer the same day. JA 1483, 1500. Jones' computer did not reject or flag the transfer to Dotson. JA 1499-1500. Dotson tried to document the transaction himself and when his tracking software did not function properly, he immediately contacted petitioner's Help Desk. JA 1027-28, 1030-33. Dotson was informed that his computer was not programmed to document transfers. JA 1030. Dotson also mentioned the transfer to Kennedy, who said nothing. JA 1017-18, 1030-33, 1319. Jones was never disciplined for the transfer and did not perceive it to violate policy. JA 1497, 1507, 1890-91, 2113-14.

On September 8, 2003, while meeting with Kennedy and other coworkers, Dotson received word that he would need to travel to Russia on September 21, 2003, for the adoption. JA 1020-21, 1036. Dotson shared the good news and his plan to donate Zithromax to the orphanage. JA 1020, 1022-24, 1411-17, 1458-59, 1808-10. Kennedy was outwardly irritated by the disruption and consequent discussions of the adoption. JA 1022-24. However, neither Kennedy nor anyone else who was present communicated any problem or perceived policy violation associated with Dotson's plan to donate Zithromax. JA 1022-24, 1032-34, 1411-17, 1458-59, 1808-10. In fact, one co-worker actually told Kennedy that she "was very excited that Jim was going to be able to take samples over to Russia." JA 1417. Kennedy did not respond in any way that would suggest that the donation would violate company policy. JA 1417.

Before leaving for Russia, Dotson twice explained to Kennedy that the starter tracking software installed on his computer was not functioning, asked Kennedy to manually record his receipt of Zithromax in petitioner's tracking system, and instructed Kennedy how to do so. JA 1024, 1027-28, 1030-33. Dotson testified that Kennedy did not tell him to contact petitioner's Help Desk, Starter Administration, or any other division of petitioner.[5] JA 1032-33. Although Kennedy knew that

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5. Kennedy testified that he told Dotson to contact "Sample Compliance"; however, there is no such department, and viewing the evidence in a light most favorable to Dotson, the jury presumably did not believe Kennedy's testimony. JA 1624-25, 3029-30.

Dotson was leaving for Russia in a matter of days, he never objected to the Zithromax transfer or donation. JA 1032-33, 1623.

From September 15 to September 17, 2003, Dotson attended an NHO conference in Florida with Kennedy and McElerney. JA 2224. Before the conference, Kennedy told McElerney that Dotson intended to donate Zithromax to the orphanage. JA 1033, 1328-29, 2220-21, 2224-26, 2231-32. McElerney, however, ***never*** spoke to Dotson about the starters, ***never*** advised Dotson that he was not permitted to receive or handle starters, and ***never*** advised Dotson that donating the starters would violate policy. JA 1033-34, 2224-26, 2231-32. Likewise, before Dotson left for Russia, Kennedy ***never*** advised Dotson that he was not permitted to receive or handle starters, ***never*** instructed Dotson to return Zithromax, ***never*** instructed Dotson that his donation would violate policy, and ***never*** reported Dotson's receipt of the starters to petitioner. JA 1017-18, 1032-33, 1626-27, 1707-08.

McElerney testified that he thought there was a violation of starter policy the minute that Dotson came into possession of Zithromax. JA 2231. However, neither McElerney nor Kennedy reported Dotson's alleged violation of starter policy ***before*** Dotson left for Russia. JA 1033-34, 1626-27, 2231. Instead, they waited until ***after*** Dotson left for Russia, and thus too late to avoid committing the alleged violation, to report the alleged policy violation. JA 2203. Had Kennedy or McElerney taken steps to prevent Dotson's alleged violation before his trip to Russia, Dotson would not have been terminated for having possessed the starters. JA 2374.

E. Dotson's Termination.

Shortly after Dotson's first trip to Russia, Kennedy and McElerney met with him to evaluate his performance. JA 1052-56. During this meeting, Dotson's supervisors raised concerns – for the first time – about the donation to the orphanage. JA 1053-55, 2203.

On October 13, 2003, Dotson left for his second trip to Russia. While en route to the airport, Dotson called Ann Hodges, his Regional HR Manager, to discuss his performance review. JA 1058-59, 1082. Hodges instead changed the subject and expressed her concern about Dotson's donation to the orphanage. JA 1059, 1082, 1197, 2092, 2151-53. Hodges did not provide Dotson with a fair opportunity to explain his position. JA 1056, 2128-29. Dotson immediately offered to retrieve Zithromax from the orphanage but was instructed not to do so. JA 1056, 1060, 1062, 1837, 2128-29.

On November 11, 2003, just over two weeks after Dotson returned home with his new daughter, Dotson was informed that he was being fired for violating petitioner's starter policy. JA 1120, 1123-27, 1130-31. Dotson was told that NHO personnel were prohibited from possessing starters and that his donation created the appearance of a *quid pro quo* and put the company at risk. JA 1123-27, 1130-32, 2132, 2739, 2743. The decision to terminate Dotson was reached by a "consensus group" comprised of McElerney; Hodges; Steve Harper, McElerney's supervisor and petitioner's NHO Vice President; Carl Wilbanks, Harper's supervisor and petitioner's Senior Vice President of the Healthcare Cluster; Dawn Rodgers, Hodges' supervisor

and petitioner's Senior Director of Human Resources; and Kristi Kienzle, a member of petitioner's Human Resources Department. JA 2085-87, 2261-62, 2352.

In reaching its decision, the consensus group relied exclusively upon information provided by Kennedy and McElerney;[6] never provided Dotson with an opportunity to explain his side of the story; and performed no independent investigation into Dotson's training on the starter policy for NHO employees. JA 1082, 1124, 1135-42, 1194-97, 2075-87, 2090-93, 2097, 2099-2102, 2114-19, 2140-44, 2151-54, 2163-67, 2316-17, 2328-2330, 2373-74, 2401-02, 2425, 2628-29, 2647, 2649-51, 2653-55, 2714-15, 2721-22, 2729-36, 2760-64, 2801-02, 2907-2911. Indeed, even before Hodges' one conversation with Dotson, on October 13, 2003, she stated in an email that there was "no doubt in her mind that Dotson should have known" he was committing a policy violation. JA 2101-03, 2740-41.

F. Evidence of Pretext.

The handling and use of starters is heavily regulated by the FDA by the Prescription Drug Marketing Act ("PDMA"), 21 U.S.C. § 353, *et seq.* JA 1838, 1851, 2656-57. To insure compliance with the PDMA, petitioner has distributed detailed and exhaustive policies and procedures for its employees to follow. JA 2656-59, 2684-2709, 2912-71. The policies prohibit transferring starters

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6. To ensure that Dotson would have no chance to defend himself, Kennedy and McElerney had prohibited him from communicating with any higher-level manager without going through them. JA 968, 1048, 1385.

to someone who lacks the authority to possess them. JA 1889-90, 1894-95, 2112. Petitioner requires any employee who learns of a starter violation to report the violation immediately. JA 1423, 2450-51, 2658-60. Failure to report or otherwise prevent a known violation ***is itself a violation*** of petitioner's policies. JA 2385-86, 2658-60.

Petitioner's policies, however, do ***not*** prohibit NHO employees from possessing or distributing starters. JA 946-48, 1060, 1093-94, 1842-43, 2465-66, 2656-59, 2684-2709, 2912-71. There is ***no written policy*** that addresses NHO personnel handling starters. JA 946-48, 1060, 1093-94, 1842-43, 2656-59, 2684-2709, 2912-71. Petitioner does not train NHO personnel on any such policy and Dotson never received any training from petitioner regarding the handling of starters either before or after joining NHO. JA 947-48, 1842-43, 2103, 2105.

With the exception of consensus group members, none of petitioner's employees were aware of the starter prohibition used to justify Dotson's termination. None of Dotson's NHO colleagues were aware of a policy prohibiting NHO employees from handling starters. JA 1415-17, 1451-53, 1458-59, 1497, 1507, 1539-40, 1802-05, 1809-10. Even NHO's Regional Manager had "no idea what [petitioner's] policy would be" regarding Dotson's receipt of starters while employed within NHO. JA 2479. Nevertheless, Kennedy, McElerney, and other consensus group members testified that the policy was just "known" to exist. JA 1627, 2106-08, 2118, 2122-23, 2204, 2219, 2399-2400, 2438, 2442-43, 2451-52, 2470. Curiously, though both Kennedy and McElerney supposedly knew of this unwritten policy and of Dotson's plan to donate the Zithromax, neither made any attempt to report or otherwise prevent the "violation"

before Dotson left for Russia. JA 1033, 1624-26, 1707-08, 2225-26, 2231-32.

Significantly, Dotson was the only employee disciplined for his part in the alleged violation of the starter policy. JA 1497, 1507, 1543, 1577-78, 1890-91, 1894-97, 2109-14. Despite their failure to prevent or timely report Dotson's alleged policy violation, neither Kennedy nor McElerney were disciplined in any way. JA 2114, 2281, 2386, 2395. Nevertheless, Harper, a consensus group member, admitted that McElerney's and Kennedy's actions ***also contributed to the appearance of a quid pro quo*** and therefore violated petitioner's policy. JA 2386.

Even though Jones transferred the starters to Dotson, she was not disciplined for her part in the alleged violation. JA 1497, 1507, 1890-91, 2109-14. The same is true for Ashley Stalker, who transferred other starters to Dotson. JA 2109-14. Put simply, even though petitioner claimed that Dotson's actions were a serious breach of its policies, it failed to take any action against anyone else who was involved in, had knowledge of, or failed to report the alleged violation.

In fact, under the PDMA, petitioner itself is required to report starter violations to the FDA within five days of discovery. JA 1839. Failure to do so actually can put the company at risk. JA 1946-47, 2656-57. Petitioner, however, did not report Dotson's alleged violation until 2005 – two years after the alleged violation.[7] JA 1942-43, 2274-75.

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7. The District Court found this to be compelling evidence of pretext. Pet. App. at 92a-93a.

REASONS FOR DENYING THE PETITION

I. The Fourth Circuit's Decision Does Not Directly Conflict with Settled Precedent in Nine Other Circuits.

A. The Fourth Circuit Did Not Reject the Retaliation Standard Adopted by Other Circuits.

In support of its argument that the Fourth Circuit rejected the retaliation standard adopted by other circuits, petitioner principally relies on a case from the Eleventh Circuit, *Strickland v. Water Works & Sewer Board*, 239 F.3d 1199, 1207 (11th Cir. 2001). Petitioner argues that pursuant to *Strickland*, for Dotson to establish unlawful retaliation under the FMLA, he must show that petitioner had notice that he was specifically invoking the FMLA as a right. Through selective quoting of the Fourth Circuit's opinion and a misguided interpretation of *Strickland*, petitioner is attempting to manufacture a circuit split where none actually exists. Contrary to Petitioner's assertion, the Fourth Circuit did not recognize an actual conflict with *Strickland*, but rather stated that "***[t]o the extent*** that *Strickland* stands for a higher retaliation burden, we decline to follow it." Appendix to Cert. Pet. ("Pet. App.") at 15a. In other words, the Court did not depart from *Strickland*, but merely held that if Pfizer's reading of the case were correct (which it is not), it would not follow such interpretation. *See id.*

Although artfully worded, the issues presented by petitioner reduce to a single argument that petitioner

has advanced throughout this litigation. Namely, that an employer cannot be held liable for retaliation under the FMLA unless the employee has spoken certain magic words that specifically and unequivocally invoke the rights protected by the FMLA. Cert. Pet. at 3-4, 14-18; Petitioner's Appellate Brief at 31-38. The Court of Appeals correctly rejected this argument based on both the Federal regulations governing the FMLA and well-settled case law.[8] Pet. App. at 13a-16a.

In reality, the standard adopted by the Fourth Circuit for FMLA retaliation claims (and applied in this case) is entirely consistent with the standards applied in other Circuits. The Fourth Circuit, like the Eleventh

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8. The Fourth Circuit clearly understands that the "employer's knowledge that the plaintiff engaged in a protected activity is part of the third element of the *prima facie* case." *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998). In *Wright v. Southwest Airlines*, 319 Fed. Appx. 232 (4th Cir. 2009), a case decided roughly at the same time as *Dotson v. Pfizer, Inc.*, the Court of Appeals affirmed the entry of summary judgment in favor of a defendant-employer on the plaintiff's FMLA claim where the only protected activity was a request for FMLA leave. However, the plaintiff in *Wright* never took the requested leave and both her request and her need for leave were not known to the decision makers who decided to terminate her employment until after she had been discharged. *See id.*; *see also Wright v. Southwest Airlines*, No. CCB-06-3020, 2008 U.S. Dist. LEXIS 66659, at **5-6, 15-17 (D. Md. Aug. 21, 2008). Therefore, the decision to terminate Wright could not have been based on any protected activity. In contrast, petitioner's decision makers knew that Dotson had taken an adoption-related (and therefore FMLA-protected) leave and, based on substantial evidence of pretext, terminated his employment ***for that reason***.

Circuit in *Strickland*, applied the burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for evaluating Title VII discrimination claims. *See Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 550 (4th Cir. 2006)); *see also Nichols v. Ashland Hosp. Corp.*, 251 F.3d 496, 502 (4th Cir. 2001). Under this framework, the Fourth Circuit concluded that Dotson gave petitioner adequate notice of his need for leave during the adoption process, prior to taking FMLA-protected leave, and that the jury's finding of unlawful discrimination was supported by the evidence at trial.[9] *See* Pet. App. at 14a-23a.

Specifically, the Fourth Circuit properly recognized that employees do not need to explicitly invoke the FMLA in order to benefit from its protections. Pet. App. at 14a. It is axiomatic that an employee need not expressly assert rights under the FMLA or even mention the FMLA to enjoy its protections. *See* 29 C.F.R. §§ 302(c), 303(b); *Babcock v. Bellsouth Adver. & Publ'g Corp.*, 348 F.3d 73, 78 n.5 (4th Cir. 2003). The employee need only provide sufficient information to reasonably apprise the employer that leave is needed for a protected reason but "need not use any magic words." *Sarnowski v. Air Brooke Limousine, Inc.*, 510 F.3d 398, 402 (3d Cir. 2007); *Brenneman v. MedCentral Health Sys.*, 366 F.3d 412, 421 (6th Cir. 2004); *see also* 29 U.S.C.

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9. As noted by the Fourth Circuit, on appeal, petitioner did not challenge the district court's finding that Dotson made out a *prima facie* case of retaliation based upon the timing of his firing under *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989). Pet. App. at 16a n.5.

§ 2612(e)(1) and 29 C.F.R. § 825.302(c) ("the employee need not expressly assert rights under the FMLA, but may only state that leave is needed for an expected birth or adoption"); 29 C.F.R. § 825.303(b) ("the employee need not expressly assert rights under the FMLA or even mention the FMLA").

It is the employer's responsibility to determine whether a leave request is covered by the Act. *Bachelder v. Am. West Airlines, Inc.*, 259 F.3d 1112, 1131 (9th Cir. 2001). *See also Spangler v. Fed. Home Loan Bank of Des Moines*, 278 F.3d 847, 851-53 (8th 2002); *Price v. City of Fort Wayne*, 117 F.3d 1022, 1025-26 (7th Cir. 1997). Once the employee makes a disclosure of information suggesting leave is protected, the employer is "expected to obtain any additional required information through informal means," 29 C.F.R. § 825.303(b), and to notify the employee. 29 C.F.R. § 825.301(c). This regulatory scheme places the compliance burden on employers with minimal action required from employees.

The evidence at trial showed that petitioner had notice of Dotson's intent to take protected leave. Dotson kept petitioner informed of his need for leave throughout the adoption process. JA 974-75, 981-93. Dotson discussed his adoption plans with Kennedy, Burnell, petitioner's third-party benefits administrator, and others. JA 974-75, 981-83, 1049-51, 2801-02. In fact, Dotson even asked Kennedy, his direct supervisor, for help with the adoption process. JA 977-78. Any suggestion by petitioner that it lacked sufficient knowledge to designate Dotson's leave as FMLA-protected because he contacted Burnell instead of some other HR manager is incredible. Not only did Dotson

not have to comply with petitioner's internal procedures to qualify for FMLA leave, *See* 29 C.F.R. § 825.302(d), there is simply no legitimate basis to argue that Dotson's decision to call an HR manager based in the Mid-Atlantic Region provided any less notice to petitioner than had he called an HR manager in the Southeast Region.

Petitioner's argument that Dotson failed to adequately notify it of his eligibility or interest in FMLA leave cannot be supported by Dotson's failure to seek unpaid leave. *See Price*, 117 F.3d at 1026 ("***in all circumstances***, it is the employer's responsibility to designate leave.") (emphasis added); *see also* 29 C.F.R. § 825.208(a) ("in all circumstances, it is the employer's responsibility to designate leave, ***paid or unpaid***, as FMLA-qualifying, and to give notice of the designation to the employee") (emphasis added). Likewise, the fact that Dotson was required to use banked or paid vacation time to complete the adoption process is immaterial. It does not excuse petitioner's failure to properly classify Dotson's adoption-related leave as protected or its failure to refrain from punishing him on account of his leave.

Petitioner is liable for retaliation in violation of the FMLA despite its seemingly intentional ignorance of Dotson's protected status. Petitioner's liability simply does not turn on its subjective belief about whether Dotson's leave was protected by the FMLA. *See Bachelder*, 259 F.3d at 1130. It is the absence from work (and work requirements) that is protected by the FMLA and not merely the invocation of FMLA rights by the employee. Petitioner's reliance on *Strickland* to support its argument is misplaced. *Strickland* stands for the

narrow rule that where "an employee completely fails to give notice that she is absent for a potentially FMLA-qualifying reason . . . the absence is not protected by the Act." *See Bachelder*, 259 F.3d at 1130-31, n.20 (properly interpreting *Strickland*); *cf. Collins v. NTN-Bower Corp.*, 272 F.3d 1006 (7th Cir. 2001); *Peeples v. Coastal Office Prods.*, 203 F. Supp. 2d 432 (D. Md. 2002), *aff'd*, 64 Fed. Appx. 860 (4th Cir. 2003); *Spangler*, 278 F.3d at 851-53; *Price*, 117 F.3d at 1025-26.

This is not a case where the Fourth Circuit made erroneous factual findings or misapplied a properly stated rule of law. It is undisputed that Dotson repeatedly gave petitioner clear, advance notice that he would be absent from work to adopt his daughter, which is an FMLA-qualifying reason; that petitioner was on notice that he was inquiring about his FMLA options; and that petitioner did not fulfill its duty to classify Dotson's leave as FMLA-protected. As properly recognized by the Fourth Circuit, "even if we accepted the higher standard for a retaliation claim implied in *Strickland*, we would still find that Dotson presented sufficient evidence for a reasonable jury to believe that he was improperly prevented from invoking his FMLA rights and fired in retaliation for actions that should have been protected under the statute." Pet. App. at 15a.

Any suggestion in *Strickland* that an employee must recite the FMLA to engage in protected activity is contrary to the FMLA and its applicable regulations. *See Babcock*, 348 F.3d at 78 n.5; *Spangler*, 278 F.3d at 851-53; *Price*, 117 F.3d at 1025-26; *see also* 29 C.F.R. § 825.208(a). As the Fourth Circuit correctly observed, "any such elevated evidentiary burden contrasts with

the applicable FMLA notice regulations, which do not differentiate between the notice to make interference claims and other claims under the FMLA." Pet. App. at 15a. Petitioner's interpretation of *Strickland* turns this scheme on its head and frees employers from compliance in the absence of certain "magic words" explicitly invoking the FMLA. Indeed, the Fourth Circuit properly concluded that if petitioner's interpretation of the FMLA were correct, it could completely avoid the requirements of the FMLA by remaining willfully ignorant to the needs of its employees. *Id.* at 11 ("Pfizer's legal argument would allow it to use its own failure to determine whether leave should be designated as FMLA-protected to block liability for retaliation.").

B. The Intermittent Nature of Dotson's Absences Does Not Show that Petitioner Lacked Knowledge of Dotson's Adoption-Related Leave or that the Fourth Circuit Failed to Focus on Intent.

Petitioner seems to argue that it could not have assumed that Dotson's adoption-related absences were FMLA-protected because he never agreed to the use of FMLA leave on an intermittent basis. Cert. Pet. at 21-22, 25-26 ("even if all the decision makers were experts . . . they could not have assumed that Dotson intended to exercise FMLA rights because such a result could not be forced upon Dotson if he did not agree with such a designation").

For the same reasons discussed above, petitioner's argument fails because Dotson is not required to specifically invoke the FMLA's protections in order to

benefit from the Act. The regulations interpreting the FMLA repeatedly emphasize that it is the employer's responsibility to determine the FMLA's applicability. *Price*, 117 F.3d at 1026 (citing 29 C.F.R. § 825.303(b)). As recognized by the Fourth Circuit, when "read in context, subsection (b)(1) to § 2612 does not create an additional hurdle for employees asking for adoption-related leave beyond the requirement that they make a request or requests for leave that is intermittent" and "does not clash with the generally-accepted position that no 'magic words' are necessary to invoke the protections of the FMLA." Pet. App. at 10a.

The requirement that an employer and employee "agree" on intermittent leave means that employers can refuse to allow this type of leave in certain adoption placement cases.[10] However, this case is entirely different from cases allowing employers a defense under § 2612 (b)(1) where the employer expressly refused to agree to intermittent leave. *See* Pet. App. at 11a (distinguishing cases). Indeed, petitioner admitted in

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10. Though not necessary to the determination of this case, it is clear that the plain language of the FMLA only requires such an agreement when the leave is taken ***after the placement*** of an adoptive child is completed. Compare 29 U.S.C. § 2612(a)(1)(B) (requiring consent only when intermittent leave is taken "***[b]ecause of the placement*** of a[n adoptive] son or daughter") with 29 C.F.R. § 825.112(a)(2) (requiring employers "to grant [intermittent leave] ***before the actual placement*** or adoption of a child if an absence from work is required for the placement . . . to proceed"). Congress' use of the phrase "because of" creates a clear temporal boundary on the need for consent. Put simply, an employee cannot take leave "[b]ecause of the placement" until the placement actually occurs.

its brief to the Fourth Circuit that "Dotson was allowed to take all the leave he requested." Petitioner's Appellate Brief at 46. Moreover, the record reflects that Dotson kept his supervisors informed about his need for adoption-related absences and was improperly dissuaded from formally pursuing his FMLA options. Pet. App. at 11a-12a. Based upon the evidence of record, petitioner's own admissions, and applicable law, the Fourth Circuit correctly determined that Dotson requested FMLA qualifying leave and that petitioner agreed Dotson could take such leave intermittently. Petitioner cannot now claim that it lacked knowledge that Dotson's leave was protected by the FMLA because the intermittent nature of the leave was not "agreed to" by Dotson.

II. The Fourth Circuit's Decision Does not Eliminate Intent from Retaliation Claims or Transform Dotson's Claim Into One of Negligent Discharge Because Dotson Proved that Petitioner's Decision Makers Knew of His Protected Status and Intentionally Retaliated Against Him for FMLA-Protected Activity.

This is not a case of negligent discharge. Nor does the Fourth Circuit's decision read intent out of FMLA retaliation claims. To the contrary, Dotson presented sufficient evidence to the jury to demonstrate discriminatory animus among petitioner's decision makers. In fact, petitioner conceded on appeal that Kennedy not only had proven animus against Dotson, but also that the jury concluded Dotson's adoption-related absences were a motivating factor in the consensus group's decision. Petitioner's Appellate Brief at 24-25.

Nevertheless, petitioner contends that the consensus group could not have harbored the requisite animus because Kennedy was not a member of the group and, as the decision maker, the group did not know of plaintiff's protected status. Petitioner's argument fails because the evidence submitted to the jury showed that both Kennedy and McElerney harbored animus toward Dotson as a result of his adoption related leave,[11] that Kennedy and McElerney acted in concert,[12] and that McElerney was a member of the consensus group that made the decision to terminate

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11. For example, as noted by the Fourth Circuit, McElerney clearly expressed his frustration with Dotson for missing a deadline due to his adoption-related trip to Russia. Pet. App. at 17a, n.6. McElerney also testified that he viewed Dotson's adoption-related absences, including those taken before his trips to Russia, as inconvenient and problematic, JA 2227-28; openly complained that Dotson failed to meet deadlines but admitted that Dotson was late only in submitting a single report, JA 2230; required Dotson to classify his leave as unprotected vacation and pressured Dotson to continue working to meet deadlines on what should have been protected leave, JA 1047, 1110-11.

12. For example, evidence showed that McElerney manufactured evidence in an effort to support Kennedy's version of events. *Compare* JA 2654-55 (email from Kennedy to McElerney and produced by McElerney that states: "Lastly, there is something in regards to samples that we should discuss"), *with* JA 2719-20 (otherwise identical email produced by Kennedy which contains no such statement which suggests that McElerney added the missing sentence after its receipt). Evidence was also presented that McElerney conspired with Kennedy to set up Dotson for the alleged policy violation that petitioner ultimately relied upon to terminate him. *See infra* pp. 30-31.

Dotson. In short, there was sufficient evidence to raise an inference that McElerney, as a member of the consensus group, was principally responsible for Dotson's termination.[13]

In *Reeves v. Sanderson Plumbing Products, Inc.*, 520 U.S. 133 (2000), this Court evaluated an employer's liability for the discriminatory motivation of a supervisory employee in the context of a disparate treatment claim. 530 U.S. at 140. Although there was no direct or circumstantial evidence that the employer's formal decision makers harbored discriminatory motivation, this Court held that the employer was not entitled to judgment as a matter of law under the *McDonnell Douglas* framework because petitioner introduced evidence that one of petitioner's superiors in the chain of authority "was motivated by age-based animus and was principally responsible for petitioner's firing." *Id.* at 151. *Reeves* stands for the principle that the person acting with discriminatory animus need not be the formal decision maker to impose liability upon

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13. In fact, Dotson presented evidence that the consensus group principally relied on information from McElerney and Kennedy in reaching the decision to terminate him. JA 968, 1048, 1082, 1124, 1135-42, 1194-97, 1385, 2075-87, 2090-93, 2097, 2099-2102, 2114-19, 2140-44, 2151-54, 2163-67, 2316-17, 2328-30, 2373-74, 2401-02, 2425, 2628-29, 2647, 2649-51, 2653-55, 2714-15, 2721-22, 2729-36, 2760-64, 2801-02, 2907-11. Although not addressed by petitioner, there was also sufficient evidence to show that the consensus group was a "cat's paw" for Kennedy and that Kennedy's animus was the motivation for the decision maker's actions. *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 290 (4th Cir. 2004).

an employer for adverse employment action, "so long as the plaintiff presents sufficient evidence to establish that the subordinate was the one 'principally responsible' for, or the 'actual decisionmaker' behind, the action." *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 288-89 (4th Cir. 2004) (citing *Reeves*, 530 U.S. at 151-52).

Similarly, in *Tuck v. Henkel Corporation*, 973 F.3d 371 (4th Cir. 1992), *abrogated on other grounds by O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), the Fourth Circuit denied summary judgment where plaintiff showed that his former supervisor was biased and influenced the employer's decision to fire him. 973 F.3d at 376-77. Even though the former supervisor did not make the ultimate termination decision, he spoke negatively about plaintiff to decision makers, gave negative evaluations, and stood to gain from plaintiff's discharge. *Id.* at 377. In *Tuck*, the Fourth Circuit held that the extent of the supervisor's influence over the decision to terminate plaintiff was a question for the jury. *See id.* Similarly, Kennedy's and McElerney's influence over the decision to terminate Dotson was a question of fact left for the jury. Based on substantial evidence, the jury resolved the question in favor of Dotson and against petitioner. At bottom, this case does not present an appropriate question of law for consideration by this Court.

III. Evidence of Pretext Supports the Fourth Circuit's Decision.

Despite petitioner's arguments to the contrary, there was substantial evidence showing that Dotson's alleged policy violation was a mere pretext for discrimination.[14] First, petitioner's starter policies do not prohibit NHO personnel from possessing or distributing starters. JA 1842-43, 2912-71. Petitioner's own witnesses either professed ignorance of such a policy, JA 1415-17, 1451-53, 1458-59, 1497, 1507, 1539-40, 1802-05, 1809-10, or admitted that there was no such written policy, JA 1842-43. Even the NHO area manager testified that he had "no idea what [Petitioner's] policy would be" regarding Dotson's receipt of starters while employed within NHO. JA 2479. Moreover, petitioner never trained Dotson on any such policy. JA 947-48, 1842-43, 2103, 2105.

Petitioner, however, claimed that Dotson just should have known better,[15] JA 2119, 2122-23, but failed to

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14. As the District Court noted, to prove pretext Dotson had to demonstrate "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's . . . reasons for its action." Pet. App. at 88a. Dotson offered such evidence in abundance.

15. Petitioner's repeated careless handling of its starter program also provided evidence of pretext and undermined any chance Dotson might have had to learn of any supposed unwritten policy against NHO personnel handling starters. Although petitioner has insisted that NHO employees do not have starter-tracking software on their company issued computers, Dotson did have starter-tracking software on his (Cont'd)

explain why none of its employees who knew of Dotson's planned donation took any action to stop him or raised any warning before he left for Russia. Indeed, Dotson informed Kennedy and other employees of his plan to take starters to the orphanage at least ten days before his first trip to Russia, yet no one warned either Dotson or petitioner about the imminent violation. JA 1020, 1022-24, 1032-34, 1411-17, 1458-59, 1626-27, 1808-10. Moreover, if Dotson's starter activity was a policy violation, petitioner never explained its complete failure to hold any other employees accountable for committing admitted policy violations.

Petitioner's incredible mischaracterization of Dotson's starter activity as giving the appearance of a *quid pro quo* is also proof that its stated reason for terminating Dotson is a *post hoc* justification for its violation of the FMLA. Petitioner has explicitly – and repeatedly – characterized Dotson's actions in giving Zithromax starters to the orphanage as ***a donation or***

(Cont'd)

computer. JA 1027-30, 1271-72. Petitioner also may insist that its NHO personnel do not receive starters directly from the warehouse; however, Dotson received seventeen cases of Viagra directly from petitioner after he was assigned to NHO. JA 948-51, 1348-49, 2674-75, 2759. Moreover, petitioner paid Dotson to maintain a starter storage unit well into his NHO tenure. JA 1115-16, 1348-49. A reasonable jury could certainly conclude from this overwhelming evidence that petitioner had no ban on NHO employees handling starters, that it never enforced any such ban even if it did have one, and that petitioner's reasons for terminating Dotson were pretextual. Certainly, petitioner's refusal to explore, understand, or consider such powerful mitigating circumstances strongly underscores the pretextual nature of its asserted reason for terminating Dotson.

gift. Cert. Pet. at 7; Petitioner's Appellate Brief at 11, 19; JA 3044, 3047. *Quid pro quo* means "something for something." *Black's Law Dictionary* 1261 (7th ed. 1999). Donations and gifts, by their very nature, are given with no expectation of receiving anything in return.

Indeed, no member of the consensus group was able to articulate how Dotson's conduct might give an appearance of a bribe. JA 2093-97, 2317-19, 2374-76. In fact, the Zithromax donation had no capacity to influence the decision to give Dotson custody. The decision was made by a Russian judge hundreds of miles away from the orphanage. JA 1010, 1014, 1368, 1370.

Furthermore, Dotson's evidence of McElerney's and Kennedy's misconduct supported – at the very least – a reasonable inference of illegal motivation. Particularly significant was McElerney's testimony that Kennedy told him about Dotson's plan to take starters to the Russian orphanage before attending a conference in Florida with Dotson. Despite this knowledge, McElerney never sought Dotson out at the conference to intercede or admonish Dotson that he would violate policy if he went forward with his plan to take starters to Russia.[16] This evidence supports two alternate – and equally damning – inferences. The first is that McElerney did not perceive Dotson's plan as a policy violation. As a consensus group member, McElerney's failure to perceive a problem raises a reasonable inference that there was no violation and there was instead a discriminatory motive behind the decision to terminate Dotson.

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16. McElerney, Kennedy and Dotson were together at the conference in Orlando for almost two full days and saw each other regularly. JA 1033-34, 2224-26, 2231-32.

A second reasonable inference from this evidence is that McElerney and Kennedy did perceive an imminent violation and saw it as a perfect opportunity to set Dotson up for termination because of their outright hostility and irritation toward Dotson's adoption-related absences. JA 1683-84, 2652, 2716, 2721-22. Chronologically, this makes perfect sense because, although they knew of Dotson's plans before he left for Russia, neither McElerney nor Kennedy raised any concerns about a starter policy violation until after Dotson had left. A rational jury could reasonably conclude that McElerney and Kennedy did not report the violation before Dotson's departure to ensure that Dotson could not avoid violating policy or save his job.[17]

Dotson's evidence also established that petitioner treated similarly situated employees who did not take FMLA leave more favorably than it treated Dotson, which is further evidence of pretext. *See Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 302 (4th Cir. 1994) (an employer's favorable treatment of similarly situated employees who did not engage in FMLA-protected activity shows pretext). Dotson received starters from both Jones and Stalker. However, neither Jones nor

17. According to Harper and petitioner's other witnesses, had Kennedy or McElerney taken steps to stop Dotson before his trip (such as reporting Dotson to Starter Administration), Dotson would not have been terminated for merely possessing starters. JA 2374. Harper also acknowledged that by failing to report Dotson's planned conduct before the trip to Russia, both McElerney and Kennedy contributed to the appearance of the *quid pro quo*. JA 2386. As noted before, neither McElerney nor Kennedy were disciplined for contributing to the appearance of the *quid pro quo*.

Stalker had taken FMLA leave and neither was disciplined for providing starters to Dotson. JA 1497, 1507, 1890-91, 2109-14. Likewise, neither McElerney nor Kennedy took FMLA leave and neither was disciplined for failing to prevent Dotson from donating starters, which failure was itself a policy violation.[18] JA 2386. If motive and intent are irrelevant with respect to policy violations,[19] then certainly McElerney, Kennedy, Jones, and Stalker, should have been disciplined for their own violations of starter policy.

Finally, Petitioner's stated reason for terminating Dotson is itself evidence of pretext. Petitioner informed Dotson that he was being fired because his conduct "put Pfizer at risk" of violating the PDMA. JA 1123-27, 1130-32, 2132, 2739, 2743. Nevertheless, petitioner instructed Dotson not to retrieve the starters from Russia and did not report to the FDA policy violations by Dotson, McElerney, Kennedy, Stalker, and Jones until nearly two years after the alleged violations. Petitioner's own policy expressly states that any starter violations should have been reported to the FDA within five days. JA 2656-59. If Petitioner truly thought that Dotson "put Pfizer at

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18. Petitioner has said that Kennedy (and presumably McElerney) had no obligation to enforce petitioner's starter policies. JA 3040, n.5. This is patently false. Petitioner's Compliance Policy states that employees who "become aware of or reasonably believe that there has been a potential or actual violation of the law, regulation or company policy or procedures," have an affirmative "obligation to report [the violation]." JA 2707.

19. *See, e.g.*, JA 2743, in which Hodges states that motive and intent are irrelevant.

risk" by creating the appearance of a *quid pro quo*, it is reasonable to expect that petitioner would have timely reported everyone to the FDA who participated in or contributed to the violation.[20] Indeed, despite Harper's testimony that Kennedy and McElerney also contributed to the appearance of a *quid pro quo*, there is no evidence that their conduct has been reported to the FDA.

For these reasons, Dotson's evidence demonstrated an abundance of "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" from which a reasonable jury could conclude that petitioner's shifting excuses for terminating Dotson were a pretext for the real reason it discharged him, i.e. his adoption-related absences. Based upon clear evidence of both animus and pretext, Fourth Circuit properly affirmed the District Court's denial of petitioner's JMOL motions on Dotson's retaliation claim. Therefore, petitioner's request for a writ of certiorari should be denied.

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20. Despite petitioner's excuses, if petitioner actually believed Dotson had created the appearance of a *quid pro quo* at the time, it should have reported the violation immediately. This Court need only compare petitioner's letter to the FDA with its current explanation for Dotson's termination to infer that petitioner's *quid pro quo* argument is a mere afterthought. JA 2774-75. It was not unreasonable for the jury to infer the same.

CONCLUSION

Respondent James D. Dotson respectfully requests that the Court deny petitioner's request for a writ of certiorari.

Respectfully submitted,

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PLAINTIFF'S EXHIBIT
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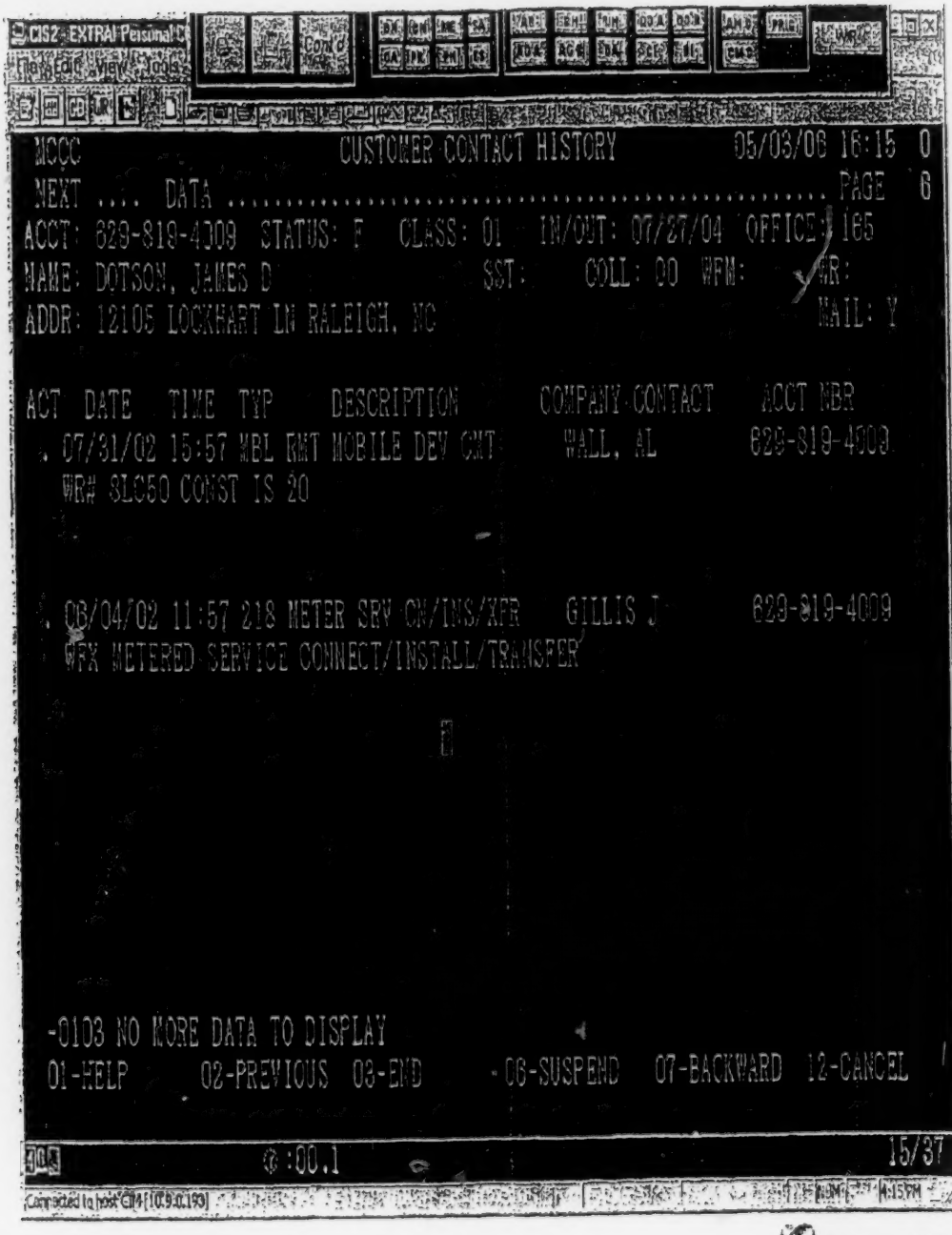

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In The Supreme Court Of The United States

PFIZER, INCORPORATED,

Petitioner,

v.

JAMES D. DOTSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Introduction

Respondent Dotson's Brief in Opposition to Pfizer's Petition for Certiorari ("Res. Br. Opp.") parrots the erroneous rationale underlying the Fourth Circuit's decision. By ignoring the significant differences between a prescriptive claim versus a claim for retaliation, which involves a violation of proscriptive rights, both the Fourth Circuit and Dotson have eliminated the "intent" element necessary to state a claim for retaliation under the FMLA. Because the Fourth Circuit improperly conflated the elements of Dotson's prescriptive claim with the fundamentally different elements of his separate retaliation claim, the decision below creates a serious split among the circuits.

Moreover, the Fourth Circuit's reliance on evidence of pretext where Dotson had failed to prove a *prima facie* case creates another split between the circuit courts. Dotson's Response repeats the Fourth Circuit's mistake by focusing on a pretext analysis when the record is barren of facts that can satisfy one of the *prima facie* elements for a FMLA retaliation claim: knowledge by Pfizer's decision makers that Dotson had exercised FMLA rights.

For these reasons, the Court should grant Pfizer's Petition to resolve the serious circuit splits created by the Fourth Circuit's decision.

1. Dotson's Response ignores the circuit split caused by the Fourth Circuit's decision to conflate prescriptive and proscriptive rights.

Dotson never asked for FMLA leave.[1] Nor did the decision makers have knowledge of Dotson invoking rights under the FMLA. Thus, the simple question presented is whether Pfizer's decision makers could form an intent to retaliate against an employee for exercising FMLA rights where the employee did not exercise or invoke the FMLA. Based upon all other circuit decisions acknowledging the difference between prescriptive and proscriptive rights, as well as generally accepted principles that apply to other federal employment retaliation statutes, Pfizer decision makers could not have formed a retaliatory intent under these circumstances. Pfizer's Petition for Certiorari at 14-18, 22-26.

Dotson spends much of his Response citing authority for the proposition that employees do not need to expressly invoke the FMLA to gain some measure of protection under the FMLA. Res. Br. Opp. at 18-19. Thus, if an employer has knowledge of an employee's need to take leave for an FMLA-qualifying event, the employer is strictly liable for violating an employee's *prescriptive* rights. This

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[1] Dotson did take intermittent vacation to complete an adoption. This event might have been counted against Dotson's FMLA leave complement if Pfizer had designated the intermittent vacation as intermittent FMLA leave and Dotson had consented to the designation. *See* 29 U.S.C. § 2612(a)(1)(B), 29 U.S.C. § 2612(b)(1).

includes the right to twelve weeks leave and the right to reinstatement at the end of the leave. *See* 29 U.S.C. §§ 2612, 2614. The intent or good will of the employer is irrelevant when it comes to an employee's prescriptive rights. *Strickland v. Water Works & Sewer Rd.*, 239 F.3d 1199, 1208-09 (11th Cir. 2001).

However, Dotson fails to acknowledge that the authority he cites applies to prescriptive rights, not proscriptive protections. The FMLA regulatory scheme is designed to administer employees' leave rights under the FMLA, not to eliminate or change the intent requirement fundamental to all retaliation claims, including FMLA retaliation claims. The Fourth Circuit erred in superimposing legal principles that apply to prescriptive rights onto an intent-based retaliation protection.

Dotson attempts to sidestep the intent requirement by arguing that it was enough for the decision makers to know that Dotson was using vacation time to adopt a child, irrespective of whether the FMLA was in the picture. However, assuming the decision makers knew that Dotson was taking vacation to effect an adoption does **not** mean the decision makers knew that he had requested and was taking FMLA leave. Dotson ignores the fact that he certainly was not obligated by law to ask for FMLA leave and was free to use paid vacation to cover his adoption-related absences. Because Dotson never asked for FMLA leave and instead took paid vacation, it was impossible for Pfizer's decision makers to know of any exercise of FMLA rights by Dotson. Because the decision makers could not have

known or believed that Dotson exercised FMLA rights, they could not have been "motivated to retaliate by something unknown to [them]." *Brungart v. BellSouth Telecommc'ns, Inc.*, 271 F.3d 791, 799 (11th Cir. 2000).

In the decision below, the Fourth Circuit held Pfizer's decision makers liable because of evidence allegedly showing that a lower-level employee, Amy Burnell, misled Dotson regarding his FMLA rights. Appendix to Petition for Certiorari ("Pet. App.") at 5a, 11a; Res. Br. Opp. at 19. However, it is undisputed that none of the decision makers were aware of the conversation between Dotson and Burnell. Therefore, any knowledge of Burnell regarding her conversation with Dotson "cannot be imputed to the decision maker." *Corbitt v. Home Depot, U.S.A., Inc.*, 2009 WL 1981383, at *14, 106 Fair Empl. Prac. Cas. (BNA) 1249, 1260 (11th Cir. July 10, 2009) (quoting *Brungart*, 231 F.3d at 799-800).

Further, Dotson admitted at trial that he would not have taken unpaid FMLA leave over paid vacation even if Burnell had correctly explained his FMLA options. J.A. at 1211. Regardless, even if Dotson would have taken FMLA leave but for Burnell's allegedly improper advice, *Dotson's intent* or understanding of his FMLA rights is not a substitute for the *decision makers' intent*. *Cf. Billet v. CIGNA Corp.*, 940 F.2d 812, 825 (3d Cir. 1991) (stating that an employee's perception of himself and his performance is irrelevant because "what matters is the perception of the decision maker"); *Branson v. Price River Coal Co.*, 853 F.3d 768, 772 (10th Cir.

1988) (same); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464-65 (7th Cir. 1986) (same); *Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980) (same).[2] If that was not the case, then Pfizer's decision makers could be held liable for retaliation based on what they "should have known." Yet retaliation claims require *actual* knowledge by the decision makers. To hold decision makers liable for retaliation based on information they "should have known" is nothing more than an action for *negligent* retaliation—an oxymoron given decades of well-established principles under all federal employment discrimination statutes, including the FMLA.

2. As demonstrated by Dotson's Response, the Fourth Circuit's decision conflicts with other circuit courts by relying on evidence of alleged pretext even though Dotson failed to establish a *prima facie* case.

In order to establish a *prima facie* case of retaliatory discharge, a plaintiff must show that (1) he engaged in statutorily protected conduct; (2) he suffered an adverse employment action; and (3) there is a causal connection between the protected conduct and the adverse employment action. *Brungart*, 231 F.3d at 798 (noting that federal courts

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[2] Dotson argues that the animus of his supervisor, Chris Kennedy, should be imputed to the decision-making group. Res. Br. Opp. at 24-25. Kennedy had no authority to issue any discipline and was not part of the decision-making team. J.A. at 1709, 2160, 2275. In any case, like all other Pfizer supervisors and managers, any animus by Kennedy could not have been based upon illegal retaliatory intent because Dotson did not exercise rights under the FMLA.

apply the burden-shifting framework established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) to FMLA retaliation claims). Once the plaintiff makes a *prima facie* case of retaliatory discharge, the burden shifts to the employer to articulate a legitimate non-retaliatory reason for the adverse employment action. *Corbitt*, 2009 WL 1981383, at *19, 106 Fair Empl. Prac. Cas. (BNA) at 1263-64. If the employer offers such a legitimate reason for the employment action, then the plaintiff must demonstrate that the employer's proffered explanation is a pretext for retaliation. *Id.*

It is well settled that evidence showing knowledge by the decision makers of plaintiff's protected status is an element of a *prima facie* case. *Brungart*, 231 F.3d at 799-800 (finding no *prima facie* case of retaliation under the FMLA where decision maker had no knowledge of protected activity); *see also Ney v. City of Hoisington*, 264 Fed. App'x 678, 682 (10th Cir. 2008); *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 90 (2d Cir. 2005); *Lubetsky v. Applied Card Sys., Inc.*, 296 F.3d 1301, 1307 (11th Cir. 2002); *Clover v. Total Sys., Inc.*, 176 F.3d 1346, 1356 (11th Cir. 1999); *Geraci v. Moody-Tottrup, Int'l, Inc.*, 82 F.3d 578, 582 (3d Cir. 1996).

Further, it is also well settled that whether an employer's stated reason for an adverse employment action is pretexual is not relevant if the plaintiff has failed to establish a *prima facie* case. *See Fedolfi v. Banyan Air Servs., Inc.*, 258 Fed. App'x 274, 277 n. 2 (11th Cir. 2007); *Plair v. E. J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997); *cf. Wexler v.*

White's Fine Furniture, 317 F.3d 564, 574 (6th Cir. 2003).

In the decision below, the Fourth Circuit assumed that Dotson had established a *prima facie* case simply because Pfizer's decision makers knew that Dotson had taken a vacation to adopt a child. Based upon that assumption, the Fourth Circuit focused its analysis on whether there was evidence to support a conclusion that Pfizer's explanation for firing Dotson was pretextual. Pet. App. 16a - 19a. Similarly, Dotson's brief to this Court focuses on evidence of alleged pretext. Res. Br. Opp. at 3, 7, 8, 11, 13-15, 28-33.

It is undisputed that Dotson did not request FMLA leave and that the company did not designate Dotson's intermittent vacation leave as FMLA leave. Thus, Dotson cannot show that he exercised FMLA rights or that anyone at Pfizer had knowledge of Dotson exercising FMLA rights. Accordingly, Dotson failed to establish a *prima facie* case. Thus, whether Pfizer's stated reason for firing Dotson was pretextual is irrelevant. *See Brungart*, 231 F.3d at 799-800.

The decision by the Fourth Circuit creates a conflict with the Eleventh Circuit in *Brungart*. The plaintiff in *Brungart* was fired the day before she was scheduled to take FMLA leave. *Id.* at 794. Thus, the company in *Brungart* had knowledge of an actual FMLA leave requested and scheduled by the

plaintiff.[3] While it was undisputed that several company officials knew that the plaintiff had requested FMLA leave, the decision maker in *Brungart* testified that he had no knowledge of the plaintiff's request for FMLA leave or that FMLA leave had been scheduled. *Id.*

The Eleventh Circuit affirmed the dismissal of plaintiff's claim in *Brungart* on the grounds that a *prima facie* case cannot be established absent proof that the decision maker knew of the plaintiff's exercise of FMLA rights. *Id.* at 799-800. The Eleventh Circuit rejected the argument that knowledge by some corporate officials that Brungart had exercised FMLA rights could be imputed to the decision maker. *Id.* at 800. The court found that because the decision maker had no knowledge of Brungart's decision to take FMLA leave, the decision maker "could not have [terminated Brungart] on the corporation's behalf because of protected conduct." *Id.*

There is even less proof of a *prima facie* case in this matter than in *Brungart*. Unlike Dotson, the plaintiff in *Brungart* actually requested FMLA leave and was scheduled to take it. Here, Dotson intentionally saved company-paid vacation and requested use of that company-paid benefit to cover his adoption-related absences. J.A. at 1049.

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[3] In contrast, as previously explained, Pfizer could not have designated Dotson's intermittent vacation leave as actual FMLA leave unless Dotson had received notice from Pfizer and then agreed to the designation. *See supra* n. 1.

Further, in sharp contrast to the plaintiff in *Brungart*, neither Dotson, nor any other company official believed that Dotson was taking FMLA leave by traveling to Russia on two different occasions to adopt his child. *See De Hoyos v. Bristol Labs. Corp.*, 218 F. Supp. 2d 222, 226-27 (D.P.R. 2002) (finding no unlawful retaliation under the FMLA where plaintiff used accrued vacation to care for his mother absent evidence employer thought plaintiff was exercising FMLA rights when leave was taken). In fact, Dotson's counsel admitted during closing arguments that he was the first person to question whether Dotson had a proscriptive claim under the FMLA. This occurred **after** Dotson had been notified of his discharge during a meeting between Dotson and his counsel. J.A. at 2583, 2825.

In summary, there is no dispute that Pfizer's decision makers knew that Dotson had permission to go to Russia to adopt a child and used paid vacation to do so. There is also no dispute that Dotson's actual exercise of FMLA rights never entered the conscious mind of anyone at Pfizer, including Dotson, until after Dotson was discharged. Because allowing a retaliation claim under these circumstances would conflict with the distinction drawn by other circuits between prescriptive and proscriptive rights, along with settled requirements for proving a *prima facie* case, certiorari should be granted to resolve these serious circuit splits.

CONCLUSION

For the foregoing reasons, Pfizer respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

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